Supreme Court, U.S.
FILED

10-339 SEP 8 - 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KIRK BENOIT, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Ben Whaley Le Clercq, J.D., LL.M.
SC Bar # 65754
Counsel of Record
353 North Shelmore, Suite 260
Mount Pleasant, SC 29464
(843) 722-3523
Ben@LeClercqLaw.com

Counsel for Petitioners

September 8, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Petitioners, African-American farmers, sought judicial review of Respondents' denial of their administrative claims, pursuant to an extraordinary statute (§ 741) which created a special administrative procedure and authorized de novo judicial review of agency determinations. The district court granted summary judgment for Respondents, and the court of appeals affirmed, on the ground that Petitioners had failed to exhaust all administrative remedies.

The following questions are presented:

1. Did the lower courts err in applying discretionary doctrines of "finality" and "exhaustion of remedies" to limit judicial review of agency action when the applicable statute plainly has no such requirements, the doctrines would impede the statute's directive for expeditious "de novo" judicial review, and the purposes of the "exhaustion of remedies" and "finality" doctrines are not served?

2. Did the lower courts' holding that Petitioners were required to have sought further administrative remedies conflict with this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992)(excessive agency delay as prejudice negating exhaustion requirement), when Respondents took more than three and as many as five years to deny Petitioners' decades-old claims, under a statute that mandated agency action within 180 days "to the maximum extent practicable"?

PARTIES TO THE PROCEEDING

Petitioners in this matter include: 1) Kirk Benoit of St. Croix, U.S. Virgin Islands; 2) Eddie Cotton, Jr. of Pattison, Mississippi; 3) Dorothy Deloney of Ashdown, Arkansas; 4) Hezekiah Gibson of Manning, South Carolina; 5) Charles Harris and Ruth Harris of Brundidge, Alabama; 6) Alphonso James and Mariet James of St. Croix, U.S. Virgin Islands; 7) Bruce Manigo of Charleston, South Carolina; 8) Donnell Manigo of Walterboro, South Carolina; 9) Randolph Manigo of Walterboro, South Carolina; 10) and 11) John Simmons of Williston, South Carolina.[1]

Respondents in this matter include: 1) United States Department of Agriculture; 2) Farm Services Agency; and 3) Edward Schafer, Secretary of the United States Department of Agriculture (substituted by United States District Court for the District of Columbia for Anne Veneman, former Secretary named in Second Amended Complaint, pursuant to Rule 25(d) of Federal Rules of Civil Procedure).

---

[1] In addition to the 12 Petitioners, plaintiffs in district court also included two other African-American farmers, but these two had not received letters from USDA denying their claims. Their cases were ultimately resolved differently, and they are not Petitioners here.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. The Lower Courts Erred In Applying Discretionary Doctrines Of "Finality" And "Exhaustion Of Remedies" To Limit Judicial Review Of Agency Action When The Applicable Statute Plainly Has No Such Requirements, The Doctrines Impede The Statute's Directive For Expeditious "De Novo" Judicial Review, And The Purposes Of The "Exhaustion Of Remedies" And "Finality" Doctrines Are Not Served. 11

II. The Lower Courts' Holding That Petitioners Were Required To Have Sought Further Administrative Remedies Conflicts With

This Court's Decision in *McCarthy* When Respondents Took More Than Three And As Many As Five Years To Deny Petitioners' Decades Old Claims, Under A Statute That Mandated Agency Action Within 180 Days "To The Maximum Extent Practicable." . . 15

CONCLUSION 18

APPENDIX

Appendix A: Court of Appeals for the D.C. Circuit, Opinion and Judgment (June 11, 2010) 1a

Appendix B: District Court for D.C., Opinion and Order and Judgment (Sept. 9, 2008) 16a

Appendix C: Letter to Kirk Benoit from USDA 50a

TABLE OF AUTHORITIES

Cases

Aircraft & Diesel Equipment Corp. v. Hirsch,
331 U.S. 752 (1947) 16

Coit Independence Joint Venture v. FSLIC,
489 U.S. 561 (1989) 16

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 15

Darby v. Cisneros,
509 U.S. 137 (1993) 14

Gibson v. Berryhill,
411 U.S. 564 (1973) 16

McCarthy v. Madigan,
503 U.S. 140 (1992) . . . . . *passim*

Patsy v. Board of Regents of Florida,
457 U.S. 496 (1982) 12

Pigford v. Glickman,
185 F.R.D. 82 (D.D.C. 1999) 12

Smith v. Illinois Bell Telephone Co.,
270 U.S. 587 (1926) 16

Walker v. Southern R. Co.,
385 U. S. 196 (1966) 16

West v. Bergland,
611 F.2d 710 (8th Cir. 1979) 16

Statutes

7 U.S.C. § 2279 [Section 741] ..... *passim*

15 U.S.C. § 1691 *et seq.* 4, 5

28 U.S.C. § 1254(1) 1

Pub. L. 105-277, § 101(a), [Title VII § 741] 5

Regulations

7 C.F.R. § 15f.9 7

7 C.F.R. § 15f.24 7

Other Authorities

144 Cong. Rec. S11433 13

144 Cong. Rec. S11434 13

Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team (Washington, D.C.; February 1997) ("CRAT Report") 11, 12, 17

United States Government Accounting Office Report: U.S. Department of Agriculture: Problems Continue to Hinder the Timely Processing of Discrimination Complaints, GAO-99-38 12

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a decision of the United States Circuit Court for the District of Columbia, affirming the decision of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia appears at Appendix 1a to the petition and is reported at 608 F.3d 17 (D.C. Cir. 2010).

The opinion of the United States District Court for the District of Columbia appears at Appendix 16a to the petition and is reported at 577 F. Supp. 2d 12 (D.D.C. 2008).

JURISDICTION

The district court, which had federal question jurisdiction over Petitioners' claims, in addition to jurisdiction pursuant to Section 741, entered its order and judgment dismissing the case on September 8, 2008. The court of appeals entered its order and judgment on June 11, 2010, affirming the district court's decision. The jurisdiction of this Court is invoked by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 2279, Section 741 states:

SEC. 741. WAIVER OF STATUTE OF LIMITATIONS.

(a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act, shall not be barred by any statute of limitations.

(b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act. The Department of Agriculture shall—

(1) provide the complainant an opportunity for a hearing on the record before making that determination;

(2) award the complainant such relief as would be afforded under the applicable statute from which the eligible complaint arose notwithstanding any statute of limitations; and

(3) to the maximum extent practicable within 180 days after the date a determination of an eligible complaint

is sought under this subsection conduct an investigation, issue a written determination and propose a resolution in accordance with this subsection.

(c) Notwithstanding subsections (a) and (b), if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial.

(d) The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over—

(1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations; and

(2) any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section.

(e) As used in this section, the term "eligible complaint" means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996—

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering—

(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(B) a housing program established under title V of the Housing Act of 1949; or

(2) in the administration of a commodity program or a disaster assistance program.

(f) This section shall apply in fiscal year 1999 and thereafter.

(g) The standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review. Chapter 5 of title 5 of the United States Code shall apply with respect to an agency action under this section with respect to an eligible complaint, without regard to section 554(a)(1) of that title.

STATEMENT OF THE CASE

Petitioners are 12 African-American farmers whose farming operations suffered, including several who lost their land, because of racial discrimination and misconduct by USDA in the administration of loan and loan servicing programs, all in violation of the Equal

Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, ("ECOA").

USDA's well documented record of race discrimination, which included years of delay, neglect and malfeasance, including mishandling, failing to respond to and "losing" complaints, led Congress in 1998 to enact extraordinary legislation re-opening the long-expired statute of limitations for ECOA claims that had been filed against USDA between 1981 and 1996. Pub. L. 105-277, § 101(a), [Title VII § 741], codified as "Waiver of Statute of Limitations," following 7 U.S.C. § 2279 [hereinafter referred to as "Section 741"]. The new law gave claimants two years to file a suit in federal court under § 741(a) or an administrative complaint with USDA under § 741(b).

All Petitioners sought administrative review under §741(b) between 1998 and 2000, filing complaints styled "Section 741 Complaint Request." USDA conducted investigations of the complaints which included taking sworn statements from Petitioners and agency officials. In 2003, 3-5 years after the complaints were filed, USDA sent each Petitioner a letter refusing to grant relief.[2]

---

[2] The letters varied slightly in their wording. Petitioner Benoit's letter, attached in the appendix, for example said USDA "has reviewed your discrimination complaint. Our review was conducted pursuant to Section 741 . . . (Statute of Limitations Project). . . Based on our review, we have determined that your case is not appropriate for informal resolution because you were not qualified for the benefits, [sic] which you applied for. Petitioner James' letter said: USDA "has reviewed your discrimination complaint. Our review was conducted pursuant to Section 741 . . . (Statute of Limitations Project or SOL). . . On

Petitioners then filed this suit in the district court.

Section 741 provides, among other things, that the agency will "conduct an investigation, issue a written determination, and propose a resolution." "To the maximum extent practicable" these are to be done within 180 days. § 741(b)(3). In the process, the agency must "provide the complainant an opportunity for a hearing on the record before making that determination," § 741(b)(1), but there are no words requiring the complainant to request such a hearing.

Section 741(c) provides for judicial review if a claim is "denied administratively," and § 741(d) gives district courts jurisdiction for judicial review of "a determination in an administrative proceeding in the Department of Agriculture." Section 741(g) states that the "standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review."

Neither the words "determination" nor "denied administratively" are modified or accompanied by the word "final."

In response to Petitioners' suit, Respondents moved for dismissal and summary judgment for failure to exhaust all available administrative remedies. The remedy that Respondents said should have been exhausted was created not by Section 741 but by

---

February 10, 2003, your case was heard by a neutral party as part of [Civil Rights'] Alternative Dispute Resolution (ADR) Program for SOL. The parties were unable to reach a mutually satisfactory resolution of this matter."

regulations issued by USDA; it was an internal USDA appeal to be heard by an ALJ, which would have resulted in "final" agency action.[3]

Petitioners argued that the letters they received were "determinations" of their complaints subject to judicial review under the statute, but the district court held that argument "cannot be squared with the language and structure of the regulations." The district court agreed with Respondents' exhaustion argument, and granted summary judgment.

The court of appeals, after approving the district court's interpretation of the word "determination," turned its attention to the statutory word "denied." It too relied on the regulations, without any reference to the statute: "The Director's letter is not judicially reviewable because § 741(c) provides for judicial review only insofar as a claim is 'denied administratively.' The letter does not do that; it merely informs the complainant of the Director's decision not to negotiate a settlement. 7 C.F.R. § 15f.9."

The court of appeals continued, "a decision to deny a complaint can be issued only to a claimant who requested a formal hearing," and concluded that "in order to exhaust their administrative remedy, the [Petitioners] would have had to request a formal hearing before an ALJ."

---

[3] The regulations provide that the ALJ's decision is final agency action, and that final agency action is judicially reviewable, 7 C.F.R. § 15f.24, but the regulations do *not* say a complainant must request an ALJ hearing as a prerequisite to judicial review nor that judicial review is *not* available for non-final agency actions.

The court of appeals considered the effect of this Court's recent decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992) on the exhaustion inquiry. The court acknowledged that *McCarthy* treated prejudice to claimants as a reason to reject an exhaustion requirement. However, the court of appeals did not acknowledge that under *McCarthy* delay in an administrative proceeding can constitute prejudice, and therefore the court of appeals did not consider whether the agency's 3-5 year delay in this case -- on complaints that were already as much as 20 years old and in the face of this statute mandating a 180-day target for agency action – was the kind of prejudice that should negate further exhaustion requirements, under general principles governing exhaustion of remedies and availability of judicial review.

This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the courts below decided important questions of administrative law, involving the availability of judicial review and the doctrine of exhaustion of administrative remedies, in a way contrary to the applicable statute and contrary to this Court's rules set forth in *McCarthy v. Madigan*, 503 U.S. 140 (1992).

The relationship between agency action and judicial review is a recurring and significant issue in the administration of justice, particularly where, as here, the agency has a well documented history of misconduct. This Court has a critical role in overseeing that relationship to insure fidelity to law and consistent administration.

In this case, the courts below departed significantly from basic principles of exhaustion of administrative remedies and judicial review. By requiring Petitioners to exhaust administrative remedies beyond what was specified in the applicable statute (§ 741), the decision below conflicts with this important statute and with the principle that exhaustion is a creature of statute. Further, by requiring further delay in the face of a statutory mandate for expeditious agency action, the decision below conflicts with general principles of exhaustion of remedies set forth in *McCarthy v. Madigan*, which treated such delay as the type of prejudice that would bar an exhaustion requirement.

Petitioners here properly exhausted their administrative remedies by seeking and being denied relief. Respondents assert, and the courts below held, that Petitioners were required to go further within the agency, even though the agency had already taken 3-5 years to reach a decision that the statute itself said should come within 180 days, on claims many of which were already more than twenty years old.

The statutory mandate of 180 days has critical significance. Though the agency may not technically be in violation of the statute for taking longer because of the words "maximum extent practicable," nevertheless the expiration of 180 days after receipt by Respondents of a Section 741 Complaint implicates important statutory rights which the lower courts did not respect, and that affirms a complainant's option to end administrative review and seek judicial review.

The lower courts' acceptance of USDA's argument seriously disrupts the law of exhaustion of remedies in several ways:

1. First, it conflicts with the principle that exhaustion is a creature of statute, because section 741, the statute that creates the special administrative procedure and authorizes judicial review, plainly indicates that no further exhaustion is required following the denial letter the agency sent to Petitioners.

2. Second, even if there were ambiguity in section 741, requiring further exhaustion here conflicts with *McCarthy*, which recognized that extreme delay -- in this case the agency had already taken 6-10 times the 180 days allowed by Congress -- is the type of prejudice that obviates further exhaustion requirements.

3. Finally, the lower courts disrupted basic administrative law doctrine by allowing regulations to trump a conflicting statute, especially where the regulations did not say what the lower courts held--i.e., the regulations do not say a complainant must request an ALJ hearing as a prerequisite to judicial review nor that judicial review is not available for non-final agency actions.

I. The Lower Courts Erred In Applying Discretionary Doctrines Of "Finality" And "Exhaustion Of Remedies" To Limit Judicial Review Of Agency Action When The Applicable Statute Plainly Has No Such Requirements, The Doctrines Impede The Statute's Directive For Expeditious "De Novo" Judicial Review, And The Purposes Of The "Exhaustion Of Remedies" And "Finality" Doctrines Are Not Served.

For complainants seeking administrative review under Section 741(b), the statute requires only that a complainant "seek a determination on the merits" from USDA and that "the claim is denied administratively" as prerequisites for judicial review. Notably, Section 741 does not contain the word "final," nor does it require that a complainant seek review from an ALJ prior to seeking "de novo" review from district court. Moreover, Section 741 does not authorize dismissal of an action for failure to exhaust. *Cf. McCarthy*, *supra*, 503 U.S. at p. 150.

Section 741, which retroactively waived ECOA's two year statute of limitation, was enacted as a response to years of racial discrimination at USDA. The agency conducted several studies of its policies and activities with respect to African-American farmers and documented its findings in several reports. In 1997, USDA released a report titled *Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team* (Washington, D.C.; February 1997) ("CRAT Report"). The CRAT Report was a key impetus behind Section 741, as it examined the "painful history" of USDA's

dealings with African-American farmers. It concluded that local credit and loan agencies responsible for administering USDA programs discriminated against African-American farmers, *Id.* at 6, and that USDA's complaints processing system was a "bureaucratic nightmare" that processed complaints slowly if at all while at the same time the agency proceeded with farm foreclosures even where discrimination may have contributed to the farmers' plight. *Id.* at 22-25.

Many complaints of race discrimination related to USDA action or inaction were filed with USDA between 1981 and 1986, but were never processed, investigated, or forwarded to the appropriate agencies for review because of "reorganizations" at USDA in the early 1980s. *See* United States Government Accounting Office Report: U.S. Department of Agriculture: Problems Continue to Hinder the Timely Processing of Discrimination Complaints, GAO-99-38. In 1983 the USDA Office of Civil Rights was disbanded, and USDA stopped responding to discrimination claims. *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).

"Of 'paramount importance' to any exhaustion inquiry is congressional intent." *McCarthy*, *supra*, 503 U.S. 144 (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). Senator Charles Robb's remarks from the Congressional Record underscore the severity of the discrimination at USDA, the importance of expeditious judicial review, and the necessity of Section 741:

> the investigative unit at USDA's Office of Civil Rights was abolished in 1983. Farmers whose complaints were pending at the time were led to

> believe their complaints were still being investigated, when they were not. Farmers who filed complaints after the abolition of the unit were also led to believe that their complaints would be processed and investigated, despite the fact that the USDA had no resources with which to conduct such investigations. The bottom line is that none of these complaints were ever considered—but none of the farmers were told that was the case.

144 Cong. Rec. S11433 (Sen. Robb).

Senator Robb also highlighted the importance of de novo review by the courts, as provided in Section 741(g), as the courts would not need to rely on the creation of a record by the agency, a factor noted in *McCarthy* which can in some cases militate in favor of exhaustion: "In other words, a court would not be required to give as much deference to USDA's decisions. This is obviously a protection that would have given aggrieved farmers a degree of legal protection that is imminently justified." 144 Cong. Rec. S11434 (Sen. Robb). He also emphasized the importance of the 180 day time limit imposed by Section 741(b)(3) on USDA, the huge "backlog of discrimination complaints" at USDA, and poor record keeping at USDA's Office of Civil Rights: an Office of the Inspector General report "characterized OCR's case files as 'too slovenly to ensure the availability of critical documents.' " *Id.*

All Petitioners sought determinations from USDA on their "Section 741 Complaints," and following lengthy USDA investigations and reviews, received letters denying their claims. Petitioners complaints

were thus "denied administratively." USDA's letter to Petitioner Benoit, attached hereto, is indicative of USDA's denials of Petitioner's complaints. USDA reviewed Benoit's "discrimination complaint" under Section 741 and "determined" that "you were not qualified for the benefits, which you applied for." Under Section 741, Benoit, and the other Petitioners, were entitled to immediate, de novo judicial review.

Section 741 limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 145 (1993). The lower courts' use of the discretionary doctrines of "finality" and "administrative exhaustion," which they took from Respondents' regulations, placed a heavier, stricter burden on Petitioners than intended by Congress in the plain language of Section 741. In essence, the lower courts violated a fundamental precept of administrative law by allowing regulations to trump a conflicting statute.

Given the expeditious, de novo review to which Petitioners were entitled following the administrative denials of their Section 741 Complaints, and the lower amount of deference to be afforded USDA's administrative process, the lower courts' use of these doctrines impeded the statutory mandates of Section 741 and thwarted Petitioners from obtaining a "final" judicial decision on their complaints.

II. The Lower Courts' Holding That Petitioners Were Required To Have Sought Further Administrative Remedies Conflicts With This Court's Decision in *McCarthy* When Respondents Took More Than Three And As Many As Five Years To Deny Petitioners' Decades Old Claims, Under A Statute That Mandated Agency Action Within 180 Days "To The Maximum Extent Practicable."

Section 741(b)(3) requires that "to the maximum extent practicable within 180 days after the date a determination of an eligible complaint is sought" USDA shall "issue a written determination and propose a resolution." The lower courts erred by reading the statute in a fashion that would preclude the option of judicial review after the passing of 180 days from the date of filing of a complaint with USDA, when the plain language of the statute and the legislative history clearly show Congress believed expeditious review of paramount importance.

The critical importance of expeditious administrative review is also highlighted in *McCarthy*, where this Court wrote that "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy*, *supra*, 503 U.S. at 146 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818 (1976)). "Accordingly, this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. . . . [A]dministrative remedies need not be pursued if the litigant's interest in immediate judicial review outweigh the government's interest in the

efficiency or autonomy that the exhaustion doctrine is designed to further." *Id.* (citing *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979)).

McCarthy focused extensively on cases where the individual interest weighs heavily against requiring administrative exhaustion, particularly, as here, where there have been significant, unreasonable delays in agency processing of claims. These cases, all cited in *McCarthy*, frequently involve undue prejudice and irreparable injury of long delays in administrative resolution of claims, and/or the "unreasonable or indefinite timeframe for administrative action:" *Gibson v. Berryhill*, 411 U.S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency"); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("Administrative remedies that are inadequate need not be exhausted" . . . . "Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern R. Co.*, 385 U. S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591–592 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief "); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

Petitioners' Section 741 complaints cited significant delays of at least three, and in some cases five years, faced by Petitioners in the processing by USDA of their decades old Section 741 Complaints. Petitioners, as with many other African-American farmers, submitted discrimination complaints to which USDA did not respond, or did not timely respond. These complaints describe the type of "irreparable injury" contemplated in *McCarthy* and the precedent cited in the previous paragraph, thus barring the application of further "administrative exhaustion" and "finality" to Petitioners by the lower courts. The lower courts erroneously applied these discretionary doctrines to Petitioners.

The Court in *McCarthy* also wrote of two additional circumstances when "exhaustion has not been required:" 1) where the challenge is to the adequacy of the agency procedure itself," or 2) where "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy*, *supra*, 503 U.S. at 148. Petitioner's challenge to USDA's slow processing of Section 741 Complaints, particularly during the period when the USDA Office of Civil Rights was disbanded in the early 1980s, in addition to the substantial evidence of administrative bias in the CRAT Report and other sources cited above, which mirror the treatment of Petitioners by USDA highlighted in their Section 741 Complaints, makes a strong showing under the second factor set out above. This additional factor buttresses Petitioners' arguments that the lower courts erred by applying "administrative exhaustion" to preclude judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ben Whaley Le Clercq, J.D., LL.M.
SC Bar # 65754
Counsel of Record
353 North Shelmore, Suite 260
Mount Pleasant, SC 29464
(843) 722-3523
Ben@LeClercqLaw.com
www.LeClercqLaw.com

Counsel for Petitioners

SEPTEMBER 8, 2010

APPENDIX

TABLE OF CONTENTS

Appendix A:	Court of Appeals for the D.C. Circuit, Opinion and Judgment (June 11, 2010)	1a
Appendix B:	District Court for D.C., Opinion and Order and Judgment (Sept. 9, 2008)	16a
Appendix C:	Letter to Kirk Benoit from USDA	50a

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5434

Argued September 21, 2009
Decided June 11, 2010

KIRK BENOIT, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-01917)

Ben Whaley Le Clercq argued the cause and filed the briefs for appellants. *Stephen A. Bogorad* entered an appearance.

Benjamin M. Shultz, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on

the brief was *Marleigh D. Dover*, Assistant Director. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: GINSBURG and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Fourteen African American farmers allege the United States Department of Agriculture discriminated against them on the basis of race (and, in one case, gender) in administering the agency's federally funded credit and benefit programs. They assert claims under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* (ECOA); the Civil Rights Act of 1866, 42 U.S.C. § 1981; the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; the common law; and the Fifth and Fourteenth Amendments to the Constitution of the United States. In this appeal we consider not the merits of the plaintiffs' claims but only whether the district court erred by entering summary judgment against the plaintiffs on their claims under the ECOA because they failed to exhaust their administrative remedy or by dismissing the plaintiffs' other claims as barred by sovereign immunity.

I. Background

The plaintiffs' discrimination claims are decades old and were long ago submitted to the USDA, which never resolved them. At one time the plaintiffs could have sued the USDA under the ECOA, but their claims under that statute were barred by the running

of the two-year limitations period. *See* 15 U.S.C. § 1691e(f).

In 1998 the Congress passed legislation reviving ECOA claims of discrimination that had been filed with the USDA from 1981 to 1996 but were barred by the statute of limitations. Section 741 of the Department's 1999 Supplemental Appropriations Act* created a two-year window within which farmers who had filed such complaints could pursue their claims in court notwithstanding the statute of limitations. Sections 741(a) and (b) each gave affected farmers a distinct option: Either file the claim (a) directly in federal district court or (b) with the USDA and, if the USDA denies the claim, then seek review of the agency decision in district court, as provided in § 741(c). Of course, a farmer who chooses option (a) "foregoles]" option (b), *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009), and *vice versa*, *see* § 714(b) ("The complainant may, in lieu of filing a civil action, seek a determination on the merits [by the USDA]").

The plaintiffs in this case chose option (b) and duly filed their claims, styled "Section 741 Complaint Requests" by the USDA, which considers such matters in two stages. The first is an informal settlement process overseen by the Director of the Office of Civil Rights (OCR). 7 C.F.R. § 15f.9. The Director may consider documents submitted by the complainant, review documents in the Department's files, and refer

---

* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 741, 112 Stat. 2681, 2681-30 to -31 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279 Historical and Statutory Notes).

the case for investigation. *Id.* Ultimately the Director either negotiates a settlement with the complainant or sends him a letter stating that the OCR will not settle the complaint and informing him of his "options, including [the] right to request formal proceedings before an ALJ." *Id.*

Some three to five years after filing their complaint requests, 12 of the present plaintiffs received letters from the Director declining to settle their complaints and informing them of their options. Messrs. Pearson and McDonald, each having waited several years when this suit was filed, had not yet received letters from the Director.

The second stage of the USDA's review process begins when a complainant requests a formal on-the-record hearing pursuant to § 741(b)(1). Any complainant may do so at any time after filing a "complaint request" and until 30 days after receiving a letter from the Director of the OCR declining to settle his complaint. 7 C.F.R. §§ 15f.9–.11. The hearing is conducted by an Administrative Law Judge. The Director provides to the ALJ and to the complainant a copy of the complaint file, along with a report stating his position concerning the complaint. *Id.* § 15f.15. The judgment of the ALJ becomes final after 35 days unless either the complainant requests review by the Assistant Secretary for Civil Rights or the Assistant Secretary *sua sponte* decides to review it. *Id.* § 15f.24(a).

The plaintiffs in this case had not requested a formal hearing when they filed this suit in 2003. The Government moved to dismiss their claims under the ECOA for failure to exhaust their administrative

remedies and to dismiss their claims for damages under the Civil Rights Act, the APA, the common law, and the Constitution as barred by sovereign immunity. With respect to the claims under the ECOA, because the parties submitted and relied upon materials outside the pleadings, the district court converted the Government's motion to dismiss into a motion for summary judgment, *Benoit v. United States Dep't of Agriculture*, 577 F. Supp. 2d 12, 22–23 (2008), which it granted. *Id.* at 23–26. The court dismissed the other claims for lack of subject matter jurisdiction, holding that the plaintiffs could not invoke the waiver of sovereign immunity for common law tort claims in the Federal Tort Claims Act (FTCA) because they had not satisfied the exhaustion requirement in that statute and that the United States had not waived its sovereign immunity to claims for damages under the Civil Rights Act, the APA, or the Constitution. *Id.* at 26–27.

II. Analysis

We review *de novo* an order of the district court dismissing a claim for lack of subject matter jurisdiction and a grant of summary judgment. *See Cope v. Scott*, 45 F.3d 445, 450 (D.C. Cir. 1995). Because we come independently to the same conclusions as did the district court, we affirm the order and judgment in all respects.

A. Sovereign Immunity

The plaintiffs wisely take no issue with the district court's holding that suits for damages against the United States under the Civil Rights Act, the APA, and the Constitution are barred by sovereign

immunity and that suits for damages against the United States under the common law must be brought pursuant to the limited waiver of sovereign immunity in the FTCA, which requires that the claimant have exhausted his administrative remedy before filing suit. *Brookens v. Solis*, 2009 WL 2414420, at *1 (D.C. Cir. 2009); *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) ("the United States has not waived its immunity to suit under [§ 1981]"); *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc) (suit for money damages not within limited waiver of sovereign immunity in APA); *Clark v. Library of Cong.*, 750 F.2d 89, 103–05 (D.C. Cir. 1984) (constitutional claims solely for monetary damages against federal official in his official capacity are barred by sovereign immunity); *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies").

The plaintiffs make two attempts to sidestep sovereign immunity by reframing their case on appeal. First, they contend the exhaustion requirement in the FTCA does not apply to claims challenging agency procedures and, in any event, their failure to exhaust was caused by their counsel's excusable neglect. These arguments are forfeit, however, because the plaintiffs did not raise them in the district court. *See, e.g.*, *Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008).

Second, the plaintiffs argue the district court should have granted them leave to amend their complaint to include a prayer for equitable relief because they suggested, in opposing the Government's motion to dismiss, that "if the Court is otherwise inclined to dismiss [the non-ECOA] counts, Plaintiffs

should be granted leave to amend these counts." The district court noted their suggestion but declined to grant leave to amend "in the absence of a formal motion." 577 F. Supp. 2d at 27. We review the district court's decision denying the plaintiffs' request for leave to amend for abuse of discretion. *See Belizan v. Hershon*, 434 F.3d 579, 582 (D.C. Cir. 2006).

We can hardly say the district court abused its discretion when we have previously held "a request for leave [to amend] must be submitted in the form of a written motion," *Belizan*, 434 F.3d at 582, and Federal Rule of Civil Procedure 7(b) provides the motion must "state with particularity the grounds for seeking the order [and] state the relief sought." The plaintiffs' unwritten, one-sentence, conditional suggestion does neither. *See Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186–87 (10th Cir. 1999) (affirming district court's refusal to consider similar one-sentence request, made in opposition to motion to dismiss, for want of "notice to the district court and the opposing party of the basis of the proposed amendment").

B. Failure to Exhaust Administrative Remedy

As noted, the district court entered summary judgment for the Government on the plaintiffs' claims under the ECOA because the plaintiffs did not exhaust their administrative remedy under § 741 by requesting a formal hearing before an ALJ. 577 F. Supp. 2d at 23. On appeal the plaintiffs argue they did not fail to exhaust their administrative remedy or, if they did, then the court should have excused their failure.

1. Did the plaintiffs exhaust?

The plaintiffs say yes because each had filed a § 741 Complaint Request and, with the exception of Messrs. Pearson and McDonald, received a letter from the Director before suing. On this view, the letter was a determination subject to judicial review pursuant to § 741(c).* As the district court stated, the plaintiffs' argument "cannot be squared with the language and structure of the regulations" implementing § 741. 577 F. Supp. 2d at 24.

The Director's letter is not judicially reviewable because § 741(c) provides for judicial review only insofar as a claim is "denied administratively." The letter does not do that; it merely informs the complainant of the Director's decision not to negotiate a settlement. 7 C.F.R. § 15f.9. A decision to deny a complaint can be issued only to a claimant who requested a formal hearing. 7 C.F.R. §§ 15f.9–.16. Therefore, in order to exhaust their administrative remedy the plaintiffs would have had to request a formal hearing before an ALJ. Although they could

---

* The plaintiffs also suggest a hearing before an ALJ was merely an optional appeal they were free to take or to leave under *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). In that case the Court explained that § 704 of the APA "by its very terms" prevents a court from requiring a party to exhaust his optional administrative appeal in order to bring an APA challenge to final agency action unless exhaustion is mandated by a statute or a rule. *Id.* at 146. That case is doubly inapplicable here: the plaintiffs' suit is under § 741(c), not under the APA, *see Darby*, 509 U.S. at 153 ("the exhaustion doctrine continues to apply as a matter of sound judicial discretion in cases not governed by the APA"), and as the plaintiffs concede, § 741 requires exhaustion, Oral arg. at 8:45.

have done so at any time after they filed their complaints with the OCR and for 30 days after receiving notice of the Director's decision, the plaintiffs filed this suit without first having requested a formal hearing. Their failure to exhaust that administrative remedy bars judicial review of their claims under the ECOA unless, as they argue, the court has, and it is appropriate in this case to exercise, discretion to excuse that omission.

2. Is the plaintiffs' failure to exhaust excusable?

The plaintiffs argue it is because, quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992), their "interests in immediate judicial review outweigh the government's interests in the efficiency and administrative autonomy that the exhaustion requirement is designed to further." According to the Government, however, we lack the power to excuse exhaustion and, in any event, doing so is not warranted in this case.

The parties agree both that § 741(c) implicitly requires exhaustion[*] and that the plaintiffs' failure to exhaust did not deprive the district court of jurisdiction. What they dispute is whether exhaustion in this case is "mandatory" — either by virtue of § 741 or by virtue of 7 U.S.C. § 6912(e),[**] which requires

---

[*] Section 741(c) provides: "if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking review of such denial."

[**] Section 6912(e) of 7 U.S.C. provides "a person shall exhaust all administrative appeal procedures . . . before the person may bring

exhaustion in suits against the USDA generally, *Munsell v. Dep't of Agriculture*, 509 F.3d 572, 579 (D.C. Cir. 2007) — and, if so, whether the court can excuse these plaintiffs' failure to exhaust. *See id.* (even "a mandatory exhaustion requirement may be excused in appropriate circumstances, whereas a jurisdictional exhaustion requirement never may be excused by a court") (dictum). Furthermore, if exhaustion is mandatory in this case, then the court's power to excuse the plaintiffs' failure to exhaust may be more limited, as the Government suggests, than is our power to excuse compliance with a non-mandatory exhaustion requirement. *See McCarthy*, 503 U.S. at 144 ("Of paramount importance to any exhaustion inquiry is congressional intent" (internal quotation marks omitted)).

Interesting as these issues are, we can decide this case without resolving them. For even if we have discretion to excuse a plaintiff's failure to exhaust their administrative remedy, a balancing of interests pursuant to *McCarthy v. Madigan* does not support our doing so in this case.

First, as the district court pointed out, the Government has a significant interest in having the plaintiffs exhaust their administrative remedy. 577 F. Supp. 2d at 23 n.16. The process of review within the USDA gives the Department "the opportunity 'to correct its own errors,'" *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 155 (D.C. Cir. 2006) (quoting *McCarthy*, 503 U.S. at 145), and thereby to avoid unnecessary

---

an action . . . against (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department."

litigation. Even if litigation is not avoided, the formal hearing before an ALJ "may produce a useful record for subsequent judicial consideration." *McCarthy*, 503 U.S. at 145–46.

There are, to be sure, limited circumstances "in which the interests of the individual [plaintiff] weigh heavily against requiring administrative exhaustion" and in favor of immediate judicial review. *Id.* at 146–47. The Supreme Court has identified at least three such circumstances — where "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action," or there is "some doubt as to whether the agency was empowered to grant effective relief," or "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id.* at 146–149.

The present plaintiffs allege none of these circumstances; instead they stress the importance of their cause, involving as it does allegations of "unlawful racial discrimination in violation of their constitutional, statutory, and common law rights," Br. of Appellants at 28, and the history of "undue delay" in the USDA's handling of their Complaint Requests.

That the plaintiffs' interest in redressing the harm allegedly done them by racial discrimination is weighty and comes squarely within the zone of interests protected by the ECOA is undoubtedly true. Those features of the case, however, do not evidence "the litigant's interests in immediate judicial review" of the sort considered in *McCarthy*. 503 U.S. at 147, *citing Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986) (disability benefit claimants "would be

irreparably injured were the exhaustion requirement now enforced against them"). The weight or intensity of a plaintiff's interest in his cause might in some circumstances indicate that exhaustion would prejudice the plaintiff or be unproductive, but in this case the plaintiffs' failure to request a formal hearing at any point during the administrative settlement process indicates the opposite.

Furthermore, there is neither logical nor empirical support for the plaintiffs' suggestion a formal hearing, had they elected to have one, would not have proceeded expeditiously. Logically, the Director of the OCR's delay of several years before responding to the plaintiffs' complaints is irrelevant; the plaintiffs could have opted for a formal hearing before an ALJ at any time while their claims were pending before the Director but, except Messrs. Pearson and McDonald, who requested review by an ALJ since filing this suit, they chose instead to wait. They suggest no other reason to think a formal hearing would not have proceeded expeditiously.

Empirically, the agency's response when Messrs. Pearson and McDonald filed their requests for review by an ALJ belies the plaintiffs' claim. According to a post-argument letter the Government submitted pursuant to Federal Rule of Appellate Procedure 28(j), the accuracy of which plaintiffs have given us no reason to doubt, within a few months of Pearson's and McDonald's requests for a hearing an ALJ was assigned to their cases and pre-hearing conferences were scheduled.

We conclude the district court properly granted summary judgment in favor of the Government on the

plaintiffs' claims under the ECOA because they failed to exhaust their administrative remedy. Applying the criteria prescribed by the Supreme Court in *McCarthy*, that failure is not excusable.

III. Conclusion

The district court properly dismissed for lack of subject matter jurisdiction the plaintiffs' claims arising under the Civil Rights Act, the APA, the common law, and the Constitution. The district court also properly granted summary judgment for the Government with respect to their claims under the ECOA, because the plaintiffs failed to exhaust the administrative remedy provided in § 741. The judgment of the district court is in all respects, therefore,

Affirmed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5434

September Term, 2009
FILED ON: JUNE 11, 2010

KIRK BENOIT, ET AL.,	)
APPELLANTS	)
	)
v.	)
	)
UNITED STATES DEPARTMENT	)
OF AGRICULTURE, ET AL.,	)
APPELLEES	)
	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-01917)

Before: GINSBURG and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

MaryAnne Lister
Deputy Clerk

Date: June 11, 2010

Opinion for the court filed by Circuit Judge Ginsburg.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 03-1917 (PLF)

[Filed September 9, 2008]

KIRK BENOIT, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,[1]	)
	)
Defendants.	)
	)

OPINION

This matter is before the Court on defendants' motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the

[1] The Second Amended Complaint named Ann Veneman, former Secretary of the United States Department of Agriculture, as one of the party defendants. The Court now substitutes her successor, Edward Schafer, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

Federal Rules of Civil Procedure.[2] Upon consideration of defendants' motion, plaintiffs' opposition, defendants' reply, and the entire record in this case, the Court will (1) grant summary judgment in favor of the defendants on plaintiffs' Equal Credit Opportunity Act claims, and (2) dismiss for lack of subject matter jurisdiction plaintiffs' claims under the United States Constitution, the Civil Rights Act of 1964, the Administrative Procedure Act, and the common law.

I. OVERVIEW

This is a discrimination suit. Fourteen African American farmers, all but two of whom opted out of the so-called Pigford litigation, see Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), allege that the United States Department of Agriculture ("USDA") has, over the course of many years, discriminated against them on the basis of race (and, in the case of plaintiff Dorothy Deloney, on the basis of sex as well) in connection with the agency's federally funded credit and benefit programs.[3]

---

[2] The papers submitted in connection with this motion include: Defendants' Motion to Dismiss Plaintiffs' Complaint Or, in the Alternative, to Transfer Venue ("Defs.' Mot."); Plaintiffs' Opposition to Defendant USDA's Motion to Dismiss ("Pls.' Opp."); and Defendants' Reply in Support of USDA's Motion to Dismiss Plaintiffs' Complaint Or, in the Alternative, to Transfer Venue ("Defs.' Reply"). As its title implies, the USDA's motion to dismiss includes a request to transfer any claims over which the Court concludes it has jurisdiction to the venues in which the surviving claimants reside. The Court's disposition of this matter makes it unnecessary to consider that request.

[3] The plaintiffs are Kirk Benoit of St. Croix, United States Virgin Islands; Eddie Cotton, Jr. of Pattison, Mississippi; Dorothy

All of the plaintiffs assert that the USDA's allegedly discriminatory conduct entitles them to monetary damages under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* ("ECOA"); the Fifth and Fourteenth Amendments to the United States Constitution; Section 1981 of the Civil Rights Act of 1964, 42 U.S.C. § 1981 ("Section 1981"); and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Plaintiffs also assert common law tort claims. See Second Amended Complaint ¶¶ 775-801 ("Compl."). As discussed in more detail below, the defendants – hereinafter referred to collectively as "the USDA" – maintain that all of the plaintiffs' claims are barred by the doctrine of sovereign immunity.

II. STANDARDS OF REVIEW

The USDA moves to dismiss all of the plaintiffs' claims for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. This is problematic as a procedural matter because, for reasons discussed below, the Court concludes that the USDA's challenges to plaintiffs' ECOA claims – unlike the USDA's challenges to plaintiffs' other claims – are not properly asserted under the rubric of Rule 12(b)(1) but must be considered under the summary judgment standard of Rule 56. The Court therefore sets forth

---

Deloney of Ashdown, Arkansas; Hezekiah Gibson of Manning, South Carolina; Charles Harris and Ruth Harris of Brundidge, Alabama; Alphonso James and Mariet James of St. Croix, United States Virgin Islands; Charles McDonald of Manning, South Carolina; Bruce Manigo of Charleston, South Carolina; Donnell Manigo and Randolph Manigo of Walterboro, South Carolina; Richard Pearson of Freeman, Virginia; and John Simmons of Williston, South Carolina.

both the standard for resolving motions to dismiss for lack of subject matter jurisdiction and the standard for resolving motions for summary judgment.

A. Rule 12(b)(1): Motion to Dismiss for Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. They therefore may hear only cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. See, e.g., Beethoven.com L.L.C. v. Librarian of Congress, 394 F.3d 939, 945 (D.C. Cir. 2005); Best v. United States, 522 F. Supp. 2d 252, 254 (D.D.C. 2007); Srour v. Barnes, 670 F. Supp. 18, 20 (D.D.C.1987) (citing City of Kenosha v. Bruno, 412 U.S. 507, 511, (1973)). The United States may be sued for money damages only when it has expressly waived its immunity from suit. See FDIC v. Meyer, 510 U.S. 471, 475 (1994) (citing Loeffler v. Frank, 486 U.S. 549, 554 (1988)).

Under Rule 12(b)(1), the plaintiffs bear the burden of establishing subject matter jurisdiction. See Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375, 377 (1994); Moms Against Mercury v. FDA, 482 F.3d 824, 828 (D.C. Cir. 2007) (citing Georgiades v. Martin-Trigona, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984)). In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all of the factual allegations in the complaint as true, but may, in appropriate cases, consider certain materials outside the pleadings. See Jerome Stevens Pharmacies, Inc. v. FDA, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005). The Court may either consider the complaint alone, or "the complaint supplemented by undisputed facts evidenced in the

record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. Nat'l Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). While the complaint is to be construed liberally, the Court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint. Nor must the Court accept plaintiffs' legal conclusions. See Best v. United States, 522 F. Supp. 2d at 255; Primax Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 47 (D.D.C. 2003).

B. Rule 56: Motion for Summary Judgment

Summary judgment may be granted only if "the pleadings, the discovery and disclosure materials on file, and any affidavits [or declarations] show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). "A fact is 'material' if a dispute over it might affect the outcome of a suit under the governing law; factual disputes that are 'irrelevant or unnecessary' do not affect the summary judgment determination." Holcomb v. Powell, 433 F.3d at 895 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 248). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving parties. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 248; Holcomb v. Powell, 433 F.3d at 895. When a motion for summary judgment is under consideration, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [his or her] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. at

255; see also Mastro v. Potomac Electric Power Co., 447 F.3d 843, 849-50 (D.C. Cir. 2006); Aka v. Washington Hospital Center, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc); Washington Post Co. v. Dep't of Health and Human Services, 865 F.2d 320, 325 (D.C. Cir. 1989). On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." Czekalski v. Peters, 475 F.3d 360, 363 (D.C. Cir. 2007).

The non-moving parties' opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. See FED. R. CIV. P. 56(e)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The non-moving parties are "required to provide evidence that would permit a reasonable jury to find" in their favor. Laningham v. U.S. Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987). If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50; see Scott v. Harris, 127 S. Ct. 1769, 1776 (2007) ("[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, 'there is no genuine issue for trial.'") (quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S 574, 587 (1986)). To defeat summary judgment, plaintiffs must produce more than "a scintilla of evidence to support [their] claims." Freedman v. MCI Telecommunications Corp., 255 F.3d 840, 845 (D.C. Cir. 2001).

III. EQUAL CREDIT OPPORTUNITY ACT CLAIMS

A. Background

All fourteen plaintiffs assert that the USDA violated the ECOA by discriminating against them in connection with the USDA's credit and non-credit benefit programs for farmers.[4] Generally speaking, plaintiffs have little in common except that they are all parties to this lawsuit. Plaintiffs reside in five states and the United States Virgin Islands; they are or were engaged in very different farming enterprises; and, with a few exceptions, all of their claims are based on different factual allegations.[5] Nevertheless, the plaintiffs' similarities are more important than their differences for purposes of this Opinion. Two similarities are most relevant. First, all plaintiffs distill from their distinct factual allegations the same legal claim: that is, that the USDA discriminated against them in violation of the ECOA by, at various times and in various ways, (1) purposely losing or failing to act on their loan applications;

---

[4] Specifically, plaintiffs assert that they were discriminated against in connection with programs administered by the Farmers Home Administration or its successor agency, the Farm Service Agency. "The former Farmers Home Administration . . . was a credit agency within USDA that was authorized, as its successor the Farm Service Agency is now, to make loans to farmers who are generally unable to obtain credit from commercial sources." Defs.' Mot. at 3.

[5] "Charlie and Ruth Harris, Alphonso and Mariet James, and brothers Bruce, Donnell and Randolph Manigo . . . are related and sue based on the same factual allegations, [but] the plaintiffs' claims otherwise rest on completely distinct sets of facts." Defs.' Mot. at 14.

(2) unreasonably delaying the processing of their loan applications; (3) denying their loan applications on the basis of race and (in one case) sex; (4) withholding loan funds for which they were approved; (5) requiring them to utilize supervised bank accounts; and/or (6) failing to inform them that local USDA decisions could be appealed. See Compl. ¶ 787. Second, all of the plaintiffs seek to assert ECOA claims that are timely only if they fall within the ambit of Section 741, a provision of law that waives the ECOA's generally applicable two-year statute of limitations for certain individuals. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1999, Pub. L. 105-277, § 741, 112 Stat. 2681 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279 Historical and Statutory Notes) (hereinafter "Section 741").

After setting forth the legal framework within which plaintiffs' ECOA claims must be considered, the Court (1) explains why the USDA's motion to dismiss plaintiffs' ECOA claims for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure is in fact properly resolved as a motion for summary judgment under Rule 56, and (2) concludes that the USDA is entitled to summary judgment on plaintiffs' ECOA claims.

B. Legal Framework

1. The Equal Credit Opportunity Act

The ECOA creates a private right of action against a creditor who discriminates against any applicant "with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex

or marital status, or age . . . .". 15 U.S.C. § 1691(a); see Garcia v. Johanns, 444 F.3d 625, 629 n. 4 (D.C. Cir. 2006). The statute defines the term "creditor" to include the United States government, see 15 U.S.C. §§ 1691a(e), (f), and thereby waives the United States' sovereign immunity for claims brought under the ECOA. See Moore v. USDA, 55 F.3d 991, 994-95 (5th Cir. 1995); Williams v. Conner, 522 F. Supp. 2d 92, 99 (D.D.C. 2007).

A plaintiff must bring any claim under the ECOA within two years of the date of the alleged violation. See 15 U.S.C. § 1691e(f). All of plaintiffs' ECOA claims are based on allegedly discriminatory conduct that occurred before 2000, see Compl. ¶¶ 34-774, but plaintiffs did not file this suit until September 15, 2003. Thus, their claims are time-barred under the ECOA's generally applicable statute of limitations. Plaintiffs argue, however, that their claims are properly before this Court pursuant to a limited waiver of the ECOA's statute of limitations contained in Section 741. See Garcia v. Johanns, 444 F.3d at 629 n.4.

Enacted in 1998, Section 741 was a response to a fundamental breakdown in the USDA's system for processing discrimination complaints. The civil rights office of the USDA was essentially "dismantled" in the early 1980s and, as a result, many administrative complaints of discrimination filed with the USDA between 1981 and 1996 "were never processed, investigated or forwarded to the appropriate agencies for conciliation." Pigford v. Glickman, 185 F.R.D. at 88. The agency's failure to properly process these complaints effectively denied a large number of complainants the right to seek relief under applicable

anti-discrimination statutes – such as the ECOA – because the limitations periods for those statutes expired while the complainants waited for a response from the USDA. See Administrative Civil Rights Adjudications Under Section 741, 63 Fed. Reg. 67392, 67392 (Dec. 4, 1998) (explaining the genesis of Section 741).

Congress addressed this problem by enacting Section 741, which retroactively waived the ECOA's two-year statute of limitations for all individuals who had filed "eligible complaints" with the USDA. Congress defined an "eligible complaint" as "a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996" – that is, during the period when USDA's complaints processing system was virtually nonexistent – "in violation of the Equal Credit Opportunity Act . . . in administering . . . a farm ownership, farm operating, or emergency loan . . . .". 7 U.S.C. § 2279 Historical and Statutory Notes, §741(e). Congress also specified two avenues of relief for those who had filed eligible complaints. First, these complainants were permitted to bring their claims of discrimination directly to federal court, provided they did so by October 21, 2000. Id. § 741(a). Second, in lieu of proceeding directly to court, these complainants were permitted to "seek a determination on the merits of [their] eligible complaint[s]" by the USDA in the first instance, id. § 741(b), and then obtain judicial review in federal court "if [their] eligible claim[s]

[were] denied administratively." Id. § 741(c).[6] Congress instructed the USDA to render administrative decisions on complaints submitted under Section 741(b) within 180 days "to the maximum extent practicable." Id. § 741(b)(3).

All of the plaintiffs now before the Court chose the latter route – that is, they sought administrative review by the USDA in the first instance under Section 741(b).

2. USDA's Implementing Regulations

USDA regulations govern the internal agency review process contemplated by Section 741(b). See 7 C.F.R. Pt. 15F ("Adjudications Under Section 741").[7] Under those regulations, individuals who choose to obtain an administrative determination in the first instance must begin by filing a Section 741 Complaint Request with the USDA's Office of Civil Rights. See 7 C.F.R. § 15f.5. The purpose of a Section 741 Complaint Request is to notify the agency that the person submitting the request would like to have his or her underlying complaint considered under the procedures

---

[6] Section 741(c) provides, in pertinent part, that "if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial." 7 U.S.C. § 2279 Historical and Statutory Notes, § 741(c). Section 741(d)(2) vests federal courts with jurisdiction over such actions. Id. § 741(d)(2) (giving federal courts jurisdiction over "any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section").

[7] Notably, plaintiffs do not challenge the validity of these regulations. See Defs.' Reply at 18.

set forth in Part 15F. See id. § 15f.4. The mere docketing of a Section 741 Complaint Request does not establish that the underlying complaint is itself an "eligible complaint" within the meaning of Section 741. See Defs.' Mot. at 10 ("Even though [an underlying complaint] enters the Section 741 process when a Section 741 Complaint Request is docketed, the regulations provide that an ALJ may, later in the process, dismiss the complaint upon finding that it does not meet § 741's 'eligible complaint' definition.").

All Section 741 Complaint Requests are automatically referred to the Director of the USDA's Office of Civil Rights (hereinafter the "Director"). See 7 C.F.R. § 15f.8. If the Director decides that a complainant's underlying complaint is "eligible," and if he decides that the individual's underlying complaint is appropriate for informal resolution, he may offer to negotiate a settlement of the underlying complaint. See id. §§ 15f.8, 15f.9. If the parties successfully negotiate a settlement, then the Director will issue a "final determination" disposing of the underlying complaint. See id. § 15f.9. If, however, the Director decides that a complaint does not meet the eligibility requirements of Section 741, or if the Director chooses not to settle an underlying complaint, or if the parties' settlement efforts are unsuccessful, the Director issues a letter to the complainant explaining the Director's decision and informing the complainant of his right "to request formal proceedings" before an Administrative Law Judge. See id.[8] To obtain ALJ review a complainant must file a

---

[8] According to the USDA, this particular review structure is mandated by Section 741, which incorporates the APA provisions

"request for a hearing" with the USDA within 30 days of receiving a decision letter from the Director, and in the case of those who received such a letter before February 14, 2003, within 90 days of that date. See Defs.' Mot. at 12; see also 7 C.F.R. § 15f.9.[9]

If the complainant *does* timely request a hearing before an ALJ, then the ALJ will review the complainant's case, conduct a hearing and issue a proposed determination. See 7 C.F.R. § 15f.13. The ALJ's proposed determination will become the agency's "final determination" as to that complainant 35 days after it is issued – unless the ALJ's decision is appealed to the USDA's Assistant Secretary for Civil Rights or the Assistant Secretary *sua sponte* decides to review the ALJ decision. Id. § 15f.24. In the event of an appeal to the Assistant Secretary, the Assistant Secretary's decision becomes the agency's final determination. See id. If the complainant *does not* timely request ALJ review, then the agency will administratively close the complainant's file. See id. § 15f.9 ("Any request for formal proceedings [before an

---

governing formal adjudications. See 7 U.S.C. § 2279 Historical and Statutory Notes, § 741(b)(1) (requiring the USDA to offer complainants an "opportunity for a hearing on the record"); 5 U.S.C. § 554(a) (providing that the APA provisions governing formal adjudications "appl[y] . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"); id. § 554(c)(1) (permitting offers of settlement).

[9] A complainant may also choose to interrupt or forego altogether the Director's informal review and proceed directly to formal ALJ review. See 7 C.F.R. § 15f.10. None of the plaintiffs currently before the Court chose this option, although Mr. McDonald and Mr. Pearson may still choose to do so.

ALJ] received by USDA after the deadlines set forth in this section will not be accepted."); see also Defs.' Mot. at 34.

C. The Parties' Arguments

Plaintiffs maintain that they sought administrative determinations of their discrimination complaints under Section 741(b); obtained final determinations denying their claims; and are now entitled to assert their ECOA claims in this Court under Section 741(c) (which, to repeat, permits individuals to seek judicial review of an agency decision "if an administrative claim [of discrimination] is denied administratively"). See Pls.' Opp. at 22-32.

Specifically, Mr. Benoit, Mr. Gibson, Mr. and Mrs. Harris and Mr. Simmons argue that their claims were "denied administratively" when they received letters from the Director declining to settle their claims. See Compl. ¶¶ 66 (Mr. Benoit), 254 (Mr. Gibson), 377 (Mr. and Mrs. Harris), 770 (Mr. Simmons). Mr. and Mrs. James argue that their claims were denied when Mr. James received a letter from the Director informing him that the USDA's attempts to resolve his complaint through alternative dispute resolution had failed. See id. ¶¶ 442-43. Ms. Deloney argues that her claim was denied when she received a letter from the Director informing her that the USDA would not engage in settlement negotiations with her because it had concluded that she never filed an "eligible complaint" within the meaning of Section 741(e). See id. ¶ 154; see also Defs.' Mot., Ex. 6, Letter from USDA to Dorothy Deloney at 2. Mr. Cotton and the three Manigo brothers, it seems, argue that their claims were denied when they received letters offering to settle some but

not all of their claims. See id. ¶¶ 99-100 (Mr. Cotton), 599 (Manigo brothers); see also Defs.' Mot. at 17. Mr. McDonald and Mr. Pearson, who have not received letters from the Director declining to settle their claims, sue on the theory that their underlying complaints "have effectively been denied by the USDA's unreasonable delay in making a final determination on their complaints." Id. ¶ 28.[10]

The USDA argues that this Court may not exercise subject matter jurisdiction over plaintiffs' ECOA claims for two reasons. First, the USDA argues that Section 741 waives the ECOA's statute of limitations only for those who filed "eligible complaints," and that the filing of an eligible complaint therefore is a jurisdictional prerequisite to judicial review under Section 741(c). The USDA further argues that "[b]ecause § 741(c)'s 'eligible complaint' requirement is jurisdictional, plaintiffs must allege in their pleading the facts necessary to meet it." Defs.' Mot. at 21. But, says the USDA,

> *none* of the plaintiffs allege . . . that [they filed] "eligible complaints" within the meaning of § 741. Moreover, based on their [Office of Civil

---

[10] According to the USDA, Mr. McDonald has not received a letter from the Director because the Director has not finished informally reviewing his claim, and Mr. Pearson has not received a letter because Mr. Pearson's claim was referred to an alternative dispute resolution proceeding that has not yet concluded. See Defs.' Mot. at 18. Plaintiffs have attached a letter suggesting that settlement discussions between Mr. Pearson and the USDA have effectively concluded, and that those efforts were unsuccessful. See Pls.' Opp., Ex. 11, Letter from Plaintiffs' Counsel to USDA at 2 (January 16, 2004).

> Rights] files, it appears that only two plaintiffs [– Mr. McDonald and Mr. Pearson –] could prove this jurisdictional element even were it to be properly pled.

Id. at 20. In other words, the USDA contends that the ECOA claims of Mr. Benoit, Mr. Cotton, Ms. Deloney, Mr. Gibson, Mr. and Mrs. Harris, Mr. and Mrs. James, the Manigo brothers and Mr. Simmons must be dismissed for lack of subject matter jurisdiction on the ground that they have not and cannot "allege facts sufficient to show that their administrative complaints" – that is, the underlying complaints on which their Section 741 Complaint Requests are based – "meet the specifications of § 741's 'eligible complaint' definition." Id. at 22.

Second, the USDA argues that this Court lacks subject matter jurisdiction over plaintiffs' ECOA claims because none of the plaintiffs obtained a final administrative determination of their claims before filing suit. See Defs.' Mot. at 28-36. Specifically, the USDA argues that if a complainant chooses to proceed under Section 741(b), "Section 741(c) permits judicial review only where an 'eligible complaint' has been 'denied administratively' by USDA, *i.e.*, only after USDA has issued its final determination disposing of the matter." Id. at 28. And under the USDA's interpretation of its regulations, only ALJs (and, on appeal from ALJ decisions, the Assistant Secretary for Civil Rights) are authorized to issue final determinations of disputed complaints; the Director of the Office of Civil Rights is not. See Defs.' Reply at 17 ("The Director's review is by definition informal and

his role is limited to deciding whether to undertake settlement negotiations with the complainant.").[11]

The USDA argues that the letters the Director sends to Section 741(b) complainants upon completing his initial review do not constitute final determinations or "denials" opening the door to judicial review under Section 741(c); rather, the only way that Section 741(b) claims are "denied administratively" is by way of formal ALJ rulings. See Defs.' Mot. at 30. Stated differently, the USDA argues that ALJ review is a prerequisite to judicial review of the agency's decisions for those who seek an administrative determination of their claims in the first instance. See Defs.' Reply at 14-16.[12] According to the USDA, all of the plaintiffs filed suit without seeking or obtaining formal ALJ review. See Defs.' Mot. at 30; see also id. at 16 ("The farthest that any of plaintiffs pursued the Section 741 process [before filing suit] was to wait for the Director to complete his *informal* review of their complaints to assess whether they were *candidates for settlement*."). Thus, says the USDA, the plaintiffs divested this Court of jurisdiction over their ECOA

---

[11] The Director is explicitly authorized to issue a "final determination" only if settlement efforts are successful. See 7 C.F.R. § 15f.9.

[12] Both sides seem to assume that this exhaustion requirement arises from the interaction of Section 741(b), Section 741(c), and 7 C.F.R. Pt. 15F. That may be true. Even if it is not, however, another provision of law requires administrative exhaustion here. See 7 U.S.C. § 6912(e); see also Munsell v. United States Dep't of Agriculture, 509 F.3d 572, 580 (D.C. Cir. 2007) (Section 6912(e) imposes a mandatory, but non-jurisdictional, exhaustion requirement).

claims by "abandon[ing]" the Section 741 process without exhausting it. Id. at 2.[13]

D. The USDA's Jurisdictional Challenges

As noted, USDA argues that the Court lacks subject matter jurisdiction for two separate reasons: (1) none of the plaintiffs filed "eligible complaints" under Section 741, and none of the plaintiffs obtained a final administrative determination from the USDA and therefore none of the plaintiffs exhausted their administrative remedies. In the Court's view, neither of these arguments should have been asserted in a motion to dismiss for lack of subject matter jurisdiction. As explained below, the eligible complaint argument and the exhaustion argument relate to the viability of plaintiffs' claims under Section 741 and the ECOA; they do not call into question the jurisdiction of this Court. The Court therefore will not address these arguments under Rule 12(b)(1).

In Arbaugh v. Y & H Corp., 546 U.S. 500, 503 (2006), the Supreme Court observed that courts and litigants too often confuse or conflate two distinct concepts: subject matter jurisdiction over a controversy and "the essential ingredients of a federal claim for relief." To reduce the frequency of such unrefined analyses, the Court articulated a "readily administrable bright line" test for determining whether a disputed issue concerns a Court's subject

---

[13] The USDA frequently articulates this argument in terms of "finality," but it is, in essence, an argument that Section 741(b) complainants must exhaust administrative remedies.

matter jurisdiction as contrasted with an essential element of the plaintiff's claim:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16; see also Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982) (statutory limitations on the scope of a federal cause of action are jurisdictional in character if they "speak in jurisdictional terms or refer . . . to the jurisdiction of the district courts"); Munsell v. United States Dep't of Agriculture, 509 F.3d at 580 (same); Fernandez v. Centerplate/NBSE, 441 F.3d 1006, 1009 (D.C. Cir. 2007) (same); Jaeger v. United States, 524 F. Supp. 2d 60, 63 (D.D.C.2007) (same). Thus, in order to decide whether the eligible complaint requirement and the exhaustion requirement are jurisdictional in nature, the Court must determine whether Congress unequivocally ranked them as such.

The USDA's first principal argument – relating to the eligible complaint requirement of Section 741 – appears to progress as follows: (1) Section 741 waives the United States' sovereign immunity; (2) the eligible complaint requirement limits the scope of that waiver; and thus (3) the eligible complaint requirement amounts to a jurisdictional limitation. Under Arbaugh, this argument cannot succeed. Nowhere in Section 741 is the eligible complaint requirement stated in

"jurisdictional terms." Zipes v. Trans World Airlines, Inc., 455 U.S. at 394. Nor is the eligible complaint requirement incorporated directly into the jurisdiction-conferring provisions of Section 741. See id.; see also 7 U.S.C. § 2279 Historical and Statutory Notes, §§ 741(d)(1), 741(d)(2). The Court therefore concludes that while Section 741 "specifies, as a prerequisite to its application, the existence of a particular fact" – namely, the filing of an eligible complaint – the existence or non-existence of that fact was not intended to have *jurisdictional* significance. Arbaugh v. Y & H Corp., 546 U.S. at 513. Rather, it appears that Congress intended for the eligible complaint requirement to be treated as an essential element of plaintiffs' ECOA claims when such claims are brought under Section 741.[14]

The USDA's second principal argument – that the exhaustion requirement is jurisdictional – is even less persuasive. It is true, of course, that "the existence of an administrative remedy automatically triggers a *non-jurisdictional* exhaustion inquiry," Avocados Plus, Inc. v. Veneman, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (emphasis added), and that a plaintiff's claim may be rejected if he or she fails to exhaust administrative remedies. See, e.g., Thompson v. DEA, 492 F.3d 428, 438 (D.C. Cir. 2007); Lowe v. DEA, Civil Action No. 06-1133, 2007 WL 2104309, at *3 (D.D.C. July 22,

---

[14] The Court is aware that this conclusion conflicts with the conclusions – or at least the terminology – of other courts that have discussed Section 741. See Ordille v. United States, 216 Fed. App'x 160, 167 (3d Cir. 2007) (designated as non-precedential pursuant to court rule); Allen v. United States, Civil Action No. 03-92C, 2005 WL 6112631, at *6 (Fed. Cl. May 10, 2005); Mients v. United States, 50 Fed. Cl. 665, 670-71 (Fed. Cl. 2001).

2007). But "'[o]nly when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision . . . has the Supreme Court held that exhaustion is a *jurisdictional* prerequisite.'" Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F.2d 1204, 1208 (D.C. Cir. 1984) (emphasis added)); see also Avocados Plus, Inc. v. Veneman, 370 F.3d at 1248 (noting that only where "a statute . . . contain[s] sweeping and direct statutory language indicating that there is no federal jurisdiction prior to exhaustion" may courts conclude that an exhaustion requirement is jurisdictional). Here, neither Section 741 nor the ECOA itself contains "sweeping and direct" statutory language making exhaustion jurisdictional. The Court therefore concludes that, like the eligible complaint requirement, the exhaustion requirement is not jurisdictional in nature.

In short, plaintiffs have pled colorable causes of action "arising under" the laws of the United States – here, the ECOA and Section 741 – and thereby properly invoked this Court's jurisdiction under 28 U.S.C. § 1331. See Arbaugh v. Y & H Corp., 546 U.S. at 513-14. The Court therefore has subject matter jurisdiction over plaintiffs' ECOA claims.

E. The USDA is Entitled to Summary Judgment on Plaintiffs' ECOA Claims

Normally the legal sufficiency of the plaintiffs' claims would be considered under the standards for failure to state a claim set forth by Rule 12(b)(6) of the Federal Rules of Civil Procedure. Here, however, that

course would be inappropriate because both parties attach and rely upon materials outside the pleadings to support their arguments, and the Court has determined not to exclude those materials. See Williams v. Conner, 522 F. Supp. 2d at 99. Under such circumstances, the proper course is to treat a putative Rule 12(b)(6) motion as a motion for summary judgment, and to resolve it accordingly after giving all parties "a reasonable opportunity to present all the material that is pertinent to the motion." FED. R. CIV. P. 12(d); see also 2 MOORE'S FEDERAL PRACTICE § 12.34[3][a] at 12-72 (3d ed. 2002). In this case, there is no question that both parties have had a reasonable opportunity to present all materials pertinent to a motion for summary judgment; indeed, both parties have submitted and relied upon voluminous exhibits.[15] The Court therefore will treat the USDA's motion as a motion to dismiss for failure to state a claim, and convert the motion to dismiss for failure to state a claim into a motion for summary judgment.

The Court concludes that the USDA is entitled to summary judgment on all of the plaintiffs' ECOA claims because (1) plaintiffs were required to exhaust

---

[15] See, e.g., Collier v. City of Chicopee, 158 F.3d 601, 603 (1st Cir. 1998) (noting that when parties attach and rely upon materials outside the pleadings, they invite the Court to consider those materials and are henceforth on constructive notice that the Court may proceed under Rule 56); In re Rothery, 143 F.3d 546, 549 (9th Cir. 1998) (no notice required when parties have had a "full and fair opportunity to ventilate the issues involved in the motion"). Discovery and/or supplemental submissions would not further clarify the issues the Court deems critical. See Taylor v. FDIC, 132 F.3d 753, 765-66 (D.C. Cir. 1997) (district courts have discretion to decide that discovery is not necessary upon conversion).

their administrative remedies; (2) exhaustion requires ALJ review; and (3) there is no genuine dispute that plaintiffs failed to seek and obtain ALJ review. Because plaintiffs' failure to exhaust entitles the USDA to summary judgment on plaintiffs' ECOA claims, the Court need not address the USDA's eligible complaint argument.

Even when, as in this case, exhaustion is not a jurisdictional prerequisite to judicial review, "[e]xhaustion of administrative remedies is generally required . . . 'so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.'" Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004) (quoting Oglesby v. United States Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990)); see also Avocados Plus, Inc. v. Veneman, 370 F.3d at 1247. For that reason, failure to exhaust precludes judicial review if "'the purposes of exhaustion' and the 'particular administrative scheme' support such a bar." Hidalgo v. FBI, 344 F.3d at 1258-59 (citation omitted). Those conditions clearly obtain here, because to permit Section 741 complainants to seek judicial review without first exhausting the administrative process set forth by the USDA

> would undercut "the purposes of exhaustion, namely, 'preventing premature interference with agency processes, . . . afford[ing] the parties and the courts the benefit of [the agency's] experience and expertise, . . . [and] compil[ing] a record which is adequate for judicial review.'" Ryan v. Bentsen, 12 F.3d 245, 247 (D.C. Cir. 1993) (quoting Weinberger v.

Salfi, 422 U.S. 749, 765 (1975) (alteration in original)).

Hidalgo v. FBI, 344 F.3d at 1259.

Plaintiffs argue that they *have* exhausted their remedies, notwithstanding their admitted failure to seek ALJ review.[16] Specifically, they maintain that the USDA misinterprets its own regulations when it argues that exhaustion requires ALJ review. See Pls.' Opp. at 22. According to the plaintiffs, the USDA's regulations give complainants "an either/or option: either have the Director . . . determine the merits of the claim or take the claim to an ALJ." Id. at 23.

---

[16] Alternatively, plaintiffs (seem to) suggest that any failure to exhaust should be excused. In their view, the agency's undue delay in rendering decisions on their complaints justifies excusing any failure to exhaust. See Pls.' Opp. at 29-33. Without passing on whether the agency has moved too slowly with respect to plaintiffs' complaints, the Court concludes that excusing plaintiffs' failure to exhaust would be inappropriate. Non-jurisdictional exhaustion requirements may be excused if "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." McCarthy v. Madigan, 503 U.S. 140, 145-46 (1992). Here, excusing the exhaustion requirements would (1) undermine the "administrative autonomy the exhaustion doctrine is designed to further," McCarthy v. Madigan, 503 U.S. at 145-46; (2) frustrate other purposes of the exhaustion doctrine, see Glisson v. United States Forest Service, 55 F.3d 1325, 1327 (7th Cir. 1995) (noting that finality, exhaustion and related doctrines help ensure that "when the administrative proceeding does come before the court, the court will have before it the mature, considered, and final articulation of the basis of the agency's action"); and (3) add another layer of cost, complexity and uncertainty to the USDA's Section 741 complaints process. The Court therefore will not excuse plaintiffs' failure to exhaust.

Plaintiffs contend that they chose the former option; that the letters they thereafter received from the Director set forth final determinations as to their claims; and that once they received those letters – or, in the case of Mr. McDonald and Mr. Pearson, once they had waited for such letters for an unreasonably long time – their claims had been "denied administratively" within the meaning of Section 741(c). At that point, say plaintiffs, they were entitled to assert their ECOA claims in this Court. See id. at 22-30.

Plaintiffs' argument must fail because their basic theory – that is, that the letters they received from the Director constitute final determinations or administrative denials of their claims – cannot be squared with the language and structure of the regulations. The regulations make clear that the administrative process is exhausted when the agency issues its final determination, see 7 C.F.R. § 15f.26; that the final determination means "the final USDA decision made on your complaint under these rules," id. § 15f.4; and that, in the absence of a settlement with the Director, a determination is final 35 days after an ALJ issues a proposed decision (absent review of that decision by the Assistant Secretary). Id. § 15f.24. If the parties do not settle, the Director is not authorized to make a final determination. Rather, the Director is only authorized to "seek to resolve the complaint informally with the complainant," id. § 15f.8, and, if settlement is unsuccessful, to inform the complainant of his "options, including [his] right to request formal proceedings before an ALJ . . . within 30 days of receipt of notice from the Director that

[USDA] will not settle the complaint." Id. § 15f.9.[17] In contrast, there are various circumstances under which ALJs are authorized to issue proposed decisions which, absent internal review by the Assistant Secretary, see id. § 15f.24, become final after 35 days. See id. § 15f.12 (authorizing the issuance of a proposed decision if the ALJ concludes that the complainant has not filed an eligible complaint, or there is no genuine dispute of fact); id. § 15f.13 (after a hearing); id. § 15f.16 (on the record without a hearing).

In short, the language and structure of the regulations offer no support for plaintiffs' view that the "informal review or negotiations" undertaken by the Director can themselves produce a final determination in the absence of settlement. Id. § 15f.10.[18] Rather, the

---

[17] Plaintiffs maintain that the language of 7 C.F.R. § 15f.9 supports their "either/or" theory of the administrative process in one particular way. They argue that Section 15f.9 states that the Director must inform complainants of their options "including" ALJ review when he declines to settle their complaints, and that the word "including" implies that complainants have another option – namely, "the statutory right to sue in federal court under Section 741(c) and (d)." Pls.' Opp. at 24. Plaintiffs offer no authority – or even analysis – for this interpretation, and the Court rejects it. Rather, the Court agrees with the USDA that the language and structure of Part 15F indicate that the "other option" assumed by Section 15f.9 is that complainants might choose not to proceed further with their claims on the view that the additional time and expense would not be worthwhile. See Defs.' Reply at 16.

[18] Nor can plaintiffs argue that this interpretation was unforeseeable. See Pls.' Opp., Ex. 10, Letter from USDA to Plaintiffs' Counsel at 2 (informing plaintiffs' counsel that "the purpose of the administrative review [by the Director] is to

regulations make clear that plaintiffs were obligated to seek ALJ review if they desired to obtain a final determination (in the form of an ALJ decision or a decision by the Assistant Secretary for Civil Rights upon review of an ALJ decision) and thereby exhaust their administrative remedies.[19]

The USDA asserts, and the plaintiffs do not dispute, that in 2003 "each of the plaintiffs except for McDonald and Pearson received a letter from [the USDA] informing them that [USDA] had reviewed the plaintiff's complaint and explaining the outcome of that review." Defs.' Mot. at 16-17. These letters – "all sent in care of plaintiffs' counsel and includ[ing] a copy of the Section 741 regulations," id. at 18 – informed the recipients that the Director would not engage in informal settlement negotiations with them for various

---

facilitate [the Director's] decision as to whether we will settle a given case").

[19] Even if the regulations were ambiguous on this point (in the sense that they offered some support for plaintiffs' "either/or" theory) the Court would defer to the USDA's interpretations of its own regulations because those interpretations are not plainly erroneous. See, e.g., S.A. Storer & Sons Co. v. Secretary of Labor, 360 F.3d 1363, 1368 (D.C. Cir. 2004) ("An agency's interpretation of its own regulations is entitled to 'substantial deference' and even receives 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994)).

reasons.[20] All of these letters included the following admonition:

> Pursuant to [Section 741], if you disagree with our decision you must request a hearing before an administrative law judge (ALJ) within thirty (30) days of receipt of this letter. Otherwise, USDA will close your file in this matter. A copy of the regulations governing this procedure is enclosed for your convenience. . . . If you receive the ALJ's decision and you are not satisfied, you may pursue your complaint by filing an action in Federal District Court.

Pls.' Opp., Ex. 13, Letter from USDA to Kirk Benoit at 1; see also id., Exs. 14, 15, 16, 17, 18, 19, 20 (letters from the Director to Ms. Deloney, Mr. Gibson, the Manigo brothers, Mr. Cotton, Mr. and Mrs. Harris, and Mr. and Mrs. James, respectively); Defs.' Mot., Ex. 18 (letter from the Director to Mr. Simmons). Thus, these letters clearly advised the recipients that the Director's informal decision did not constitute a final determination; that they were obligated to seek ALJ review to keep their Section 741 Complaint Requests alive; and that ALJ review was a prerequisite to judicial review. This message was reinforced by the enclosure of the regulations setting forth the administrative scheme in its entirety.

---

[20] Again, the letters sent to Mr. Cotton and the three Manigo brothers, unlike the letters sent to the other plaintiffs, informed them that the Director would be willing to engage in informal settlement negotiations with respect to *some* of their claims.

The USDA asserts that the plaintiffs who received letters never requested ALJ review before or after filing suit, and that those who did not receive letters (Mr. McDonald and Mr. Pearson) have similarly failed to request formal proceedings. See Defs.' Mot., Ex. 1, Declaration of Frederick D. Isler ¶¶ 10 (Mr. Benoit), 13 (Mr. Cotton), 17 (Ms. Deloney), 21 (Mr. Gibson), 25 (Mr. and Mrs. Harris), 29 (Mr. and Mrs. James), 34 (Manigo brothers), 39 (Mr. Simmons), 43 (Mr. Pearson), 47 (Mr. McDonald) ("Isler Decl.").[21] Plaintiffs do not contest this crucial factual assertion. See Pls.' Opp. at 30. That being the case, there is no genuine dispute with respect to whether the plaintiffs failed to exhaust their administrative remedies. As the Court has already determined that exhaustion – although not jurisdictional – is a prerequisite to judicial review under Section 741(c), and that the plaintiffs have offered no reason to excuse their failure to exhaust in this case, the USDA is entitled to summary judgment on plaintiffs' ECOA claims.[22]

---

[21] Mr. Isler is the USDA official charged with "overseeing and supervising the program discrimination complaint process administered by [the Office of Civil Rights]." Isler Decl. ¶ 1. Plaintiffs argue that this Court should not consider Mr. Isler's declaration, mainly on the ground that it contains inadmissible hearsay. See Pls.' Opp. at 8. This argument is beside the point here because plaintiffs do not dispute the only pertinent facts – that is, the facts relating to their failure to exhaust.

[22] To be clear, the Court grants summary judgment on plaintiffs' ECOA claims only with respect to the issue disputed by the parties: that is, whether the plaintiffs may seek judicial review of the agency's decisions and assert their ECOA claims before this Court pursuant to Section 741(c). The Court need not, and does not, express any view as to the merits of the plaintiffs' underlying complaints of discrimination.

IV. PLAINTIFFS' OTHER CLAIMS

Plaintiffs also bring claims under various provisions of the United States Constitution, the civil rights laws, the APA and the common law. These claims do not require extended discussion. Briefly stated, plaintiffs claim that the USDA's allegedly discriminatory conduct violated their rights to equal protection of the laws and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution; denied them their rights to "make and enforce contracts" on the same terms as white citizens under Section 1981 of the Civil Rights Act of 1964; and tortiously subjected them to "untold emotional distress." See Compl. ¶¶ 775-80 (constitutional claims), 789-94 (claims under Section 1981), 799-801 (claims for negligent infliction of emotional distress). Plaintiffs also argue that they are entitled to money damages under the APA for the USDA's unreasonable delay in processing their complaints. See id. ¶¶ 795-98.

As noted above, the USDA has moved to dismiss all of these claims for lack of subject matter jurisdiction. The USDA argues that the plaintiffs' claims under the Constitution, Section 1981 and the APA must be dismissed because the United States has not waived its sovereign immunity to damages actions under these statutes. The USDA further argues that plaintiffs' negligent infliction of emotional distress claims must be dismissed because plaintiffs have failed to exhaust the administrative process for pursuing such claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq*. See Defs.' Mot. at 36-40.

The United States has not waived its sovereign immunity to damages claims under the Constitution, see Jackson v. Bush, 448 F. Supp. 2d 198, 201 (D.D.C. 2006), Section 1981, see Hohri v. United States, 782 F.2d 227, 245 n.43 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987), or the APA. See 5 U.S.C. § 702. Moreover, it is established that the FTCA is the exclusive avenue of relief for parties asserting tort claims against the United States – and that the FTCA's exhaustion requirement is a jurisdictional prerequisite to suit. See Simpkins v. District of Columbia, 108 F.3d 366, 371 (D.C. Cir. 1997) (citing Odin v. United States, 656 F.2d 798, 802 (D.C. Cir. 1981)); Hayes v. United States, 539 F. Supp. 2d 393, 398-99 (D.D.C. 2008).

Plaintiffs do not dispute that their claims for monetary damages under the Constitution, Section 1981, or the APA are barred by sovereign immunity. See Pls.' Opp. at 33. Nor do they dispute that they have failed to begin (let alone exhaust) the administrative review process mandated by the FTCA. See id. The Court therefore will dismiss all of the plaintiffs' claims under the Constitution, Section 1981, the APA and the common law of torts for lack of subject matter jurisdiction under Rule 12(b)(1).[23]

---

[23] Plaintiffs have suggested that if "this Court agree[s] with USDA [that sovereign immunity bars plaintiffs' claims under the Constitution, Section 1981 and the APA], leave to amend to seek equitable relief on these claims should be liberally granted." Pls.' Opp. at 33. The Court declines to grant permission to amend the Second Amended Complaint in the absence of a formal motion to that effect. See Shane v. United States, Civil Action No. 07-577, 2008 WL 101739, *10 n.11 (D.D.C. Jan. 9, 2008).

V. CONCLUSION

For the reasons stated above, the Court will grant summary judgment in favor of the USDA on plaintiffs' ECOA claims and dismiss plaintiffs' other claims for lack of subject matter jurisdiction. An Order consistent with this Opinion will issue this same day.

SO ORDERED.

/s/_____
PAUL L. FRIEDMAN
United States District Judge

DATE: September 8, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 03-1917 (PLF)

[Filed September 9, 2008]

KIRK BENOIT, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,[1]	)
	)
Defendants.	)

ORDER AND JUDGMENT

For the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that defendants' Motion to Dismiss Plaintiffs' Complaint Or, in the Alternative, to Transfer Venue [12] is GRANTED in part and DENIED in part; it is

[1] The Second Amended Complaint named Ann Veneman, former Secretary of the United States Department of Agriculture, as one of the party defendants. The Court now substitutes her successor, Edward Schafer, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

FURTHER ORDERED that the defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure is GRANTED with respect to plaintiffs' claims under the United States Constitution, Section 1981 of the Civil Rights Act of 1964, the Administrative Procedure Act and the common law of torts; it is

FURTHER ORDERED that the defendants' motion to dismiss for lack of subject matter jurisdiction is converted into a motion for summary judgment under Rule 56 with respect to plaintiffs' claims under Section 741 and the ECOA; it is

FURTHER ORDERED that judgment is entered in favor of the defendants on all of the plaintiffs' claims under the Equal Credit Opportunity Act; and it is

FURTHER ORDERED that this case is dismissed from the docket of this Court. This is a final appealable order. See FED. R. APP. P. 4(a).

SO ORDERED.

/s/_____
PAUL L. FRIEDMAN
United States District Judge

DATE: September 8, 2008

APPENDIX C

[USDA logo]

United States
Department of
Agriculture

Office of the
Assistant Secretary
for Administration

Office of
Civil Rights

1400 Independence
Avenue SW

Washington, DC
20250

Mr. Kirk Benoit
c/o Louise Cobbs, Esquire
Holland & Knight
2099 Pennsylvania Ave., NW
Washington, DC 20006

Docket No. 2478

Dear Mr. Benoit:

The Office of Civil Rights (CR), United States Department of Agriculture (USDA), has reviewed your

discrimination complaint. Our review was conducted pursuant to Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A section 101 (a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277 (Statute of Limitations Project).

Based on our review, we have determined that your case is not appropriate for informal resolution because you were not qualified for the benefits, which you applied for. The record demonstrates that you were an existing farmer at the time of your loan application. The agency's regulations required you to submit your actual production and financial history for 5 years immediately preceding the year of application. While a proposed Farm and Home Plan was submitted, it was not feasible. Thus, it did not meet the agency's requirements.

Pursuant to the Statute of Limitations Project, if you disagree with our decision you must request a hearing before an administrative law judge (ALJ) within thirty (30) days of receipt of this letter. Otherwise, USDA will close your file in this matter. A copy of the regulations governing this procedure is enclosed for your convenience.

To request a hearing before an ALJ, you should write to:

U.S. Department of Agriculture
Office of Civil Rights
Program Adjudication Division
ATTN: SOL Project
300 7th Street, S.W.

Suite 400, Stop Code 9430
Washington, D.C. 20024

You may also fax your request to (202) 401-0214. If you receive the ALJ's final decision and you are not satisfied, you may pursue your complaint by filing an action in Federal District Court. Choosing to request a hearing before an ALJ, will not preclude you from going to Federal Court at a later time.

If you do not understand any of your rights as explained in this letter and in the enclosed regulations, we urge you to consult with an attorney as soon as possible.

Sincerely,

/s/ Frederick D. Isler
Frederick D. Isler
Deputy Director
Office of Civil Rights

Enclosures

Supreme Court, U.S.
FILED
MAR 23 2011

No. 10-339

In the Supreme Court of the United States

KIRK BENOIT, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
BENJAMIN M. SHULTZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 1998, Congress enacted Section 741 of Public Law No. 105-277, 112 Stat. 2681-30, in order to permit farmers to bring certain time-barred discrimination claims against the Department of Agriculture. Petitioners submitted claims under that statute to the agency for administrative resolution, but then brought suit in federal court without requesting a hearing before an administrative law judge or receiving a final administrative denial. The question presented is:

Whether petitioners' claims in federal court are barred due to their failure to exhaust administrative remedies.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bell v. *New Jersey*, 461 U.S. 773 (1983) 13
Booth v. *Churner*, 532 U.S. 731 (2001) 9
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 12
Chevron, U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 13
Darby v. *Cisneros*, 509 U.S. 137 (1993) 8, 12
McCarthy v. *Madigan*, 503 U.S. 140 (1992) 7, 9, 13, 14
McDonald v. *Vilsack*, SOL Docket No. 09-0177, 2010 WL 3025816 (U.S.D.A. July 8, 2010) 15
McKart v. *United States*, 395 U.S. 185 (1969) 14
Richard Pearson, In re, SOL Docket No. 09-0178 (U.S.D.A. Oct. 13, 2010) 15
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 12

Statutes and regulations:

Administrative Procedure Act, 42 U.S.C. 1981 ..... 7, 8, 12

Statutes and regulations—Continued: Page

Equal Credit Opportunity Act, 15 U.S.C. 1691:
15 U.S.C. 1691(a)(1) 2
15 U.S.C. 1691e(a) 2
15 U.S.C. 1691e(d) 2
15 U.S.C. 1691e(f) 2
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681:
§ 741, 112 Stat. 2681-30 ..... *passim*
§ 741(a), 112 Stat. 2681-30 ..... 3, 10, 14
§ 741(b), 112 Stat. 2681-30 ..... 3, 6, 10
§ 741(b)(1), 112 Stat. 2681-30 3
§ 741(b)(2), 112 Stat. 2681-30 3
§ 741(b)(3), 112 Stat. 2681-31 3
§ 741(c), 112 Stat. 2681-31 ..... 3, 8, 10, 12
§ 741(d), 112 Stat. 2681-31 3
§ 741(g), 112 Stat. 2681-31 3
7 U.S.C. 2279 note 3
7 U.S.C. 6912(e) 7, 8, 10, 15
7 C.F.R.:
Section 15.52 (1997) 2
Section 15d 4
Section 15d.2 ..... 2, 3
Section 15d.4 2
Section 15f 4, 12
Section 15f.5 6
Section 15f.8 4

Regulations—Continued: Page

Section 15f.9 ..... 4, 5, 11
Section 15f.10 ..... 4, 14
Section 15f.12 ..... 5, 11
Section 15f.13 11
Section 15f.21(d) 5
Section 15f.21(d)(1) 14
Section 15f.24(a) 5
Section 15f.24(b) 5
Section 15f.26 5

Miscellaneous:

31 Fed. Reg. 8175 (1996) 2
63 Fed. Reg. (1998):
pp. 62,962-62,963 2
p. 67,392 ..... 2, 4

In the Supreme Court of the United States

No. 10-339

KIRK BENOIT, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 608 F.3d 17. The opinion of the district court (Pet. App. 16a-47a) is reported at 577 F. Supp. 2d 12.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2010. The petition for a writ of certiorari was filed on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Since 1966, United States Department of Agriculture (USDA) regulations have proscribed discrimination in its programs based on "race, color, religion, sex,

age, [and] national origin," among other attributes. 7 C.F.R. 15d.2; see 31 Fed. Reg. 8175 (1966) (promulgating 7 C.F.R. 15.52 (1997), the predecessor to 7 C.F.R. 15d.4). USDA regulations have further provided that the agency can receive complaints about such discrimination. If a farmer files such a complaint, and USDA concludes that the complaint is meritorious, the agency is authorized to take corrective action. 7 C.F.R. 15d.4; see 7 C.F.R. 15.52 (1997).

When the claimed discrimination involves USDA's loan programs, other remedies are also available. In particular, farmers who think they are victims of credit discrimination can file suit under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691(a)(1), which prohibits creditors—including USDA—from engaging in racial and gender discrimination. A successful ECOA plaintiff is eligible to receive compensatory damages, as well as costs and attorney's fees. [illegible] S.C. 1691e(a) and (d). There is no requirement that a farmer file a complaint with USDA as a prerequisite to maintaining an ECOA suit. See Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed. Reg. 62,962, 62,963 (1998).

b. Between 1981 and 1998, a number of farmers filed discrimination complaints with USDA in accordance with the agency's complaint process. Despite the fact that many of the farmers alleged discrimination in USDA's credit programs, they did not bring suit under ECOA. 63 Fed. Reg. 67,392 (1998). In light of ECOA's two-year statute of limitations, 15 U.S.C. 1691e(f), it was clear by 1998 that few of those farmers had timely ECOA claims against USDA for any discrimination that had occurred over the preceding two decades. 63 Fed. Reg. at 67,392.

In 1998, Congress enacted the statute known as Section 741. Ominbus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 741, 112 Stat. 2681-30 (7 U.S.C. 2279 note). Section 741, entitled "Waiver of Statute of Limitations," gave potential claimants two years from the date of its enactment to seek relief for discrimination alleged in an "eligible complaint," *i.e.*, a complaint filed with USDA before July 1, 1997. 112 Stat. 2681-30. Section 741 also gave claimants an explicit choice in *how* they wanted to seek such relief: they could (1) file an action directly in federal court, § 741(a), or (2) "in lieu of filing a civil action, seek a determination on the merits of the eligible complaint" through a special administrative process, § 741(b). *Ibid.*

If a claimant chose the administrative route, Section 741(b) directed USDA to provide the claimant an opportunity for a hearing and, if the claimant was successful, to award the claimant the relief he or she would be entitled to under the statute that provided the basis for the claim. § 741(b)(1) and (2), 112 Stat. 2681-30. Section 741(b) also directed USDA to "issue a written determination and propose a resolution" on the complaint "to the maximum extent practicable within 180 days" after a claimant sought an administrative determination. § 741(b)(3), 112 Stat. 2681-31.

If an eligible claim was "denied administratively," the claimant was given "at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial." § 741(c), 112 Stat. 2681-31. Jurisdiction to conduct de novo "judicial review of a determination in an administrative proceeding" under Section 741(b) was vested in the federal dis-

trict courts and the Court of Federal Claims. § 741(d) and (g), 112 Stat. 2681-31.

c. Shortly after Section 741 was enacted, USDA promulgated regulations to govern its administrative review of "eligible complaints" under that statute. See 63 Fed. Reg. at 67,392. Those regulations are distinct from the regulations governing USDA's handling of discrimination complaints more generally. Compare 7 C.F.R. 15f (Section 741 complaint regulations) with 7 C.F.R. 15d (see p. 2, *supra*).

The Section 741 regulations instruct USDA initially to refer complaints to the Director of USDA's Office of Civil Rights (Director), who conducts an "informal review" to see if the complaint can be resolved outside the formal hearing process. 7 C.F.R. 15f.8. If the Director concludes that the complaint is an "eligible complaint," he will examine documents submitted by the claimant and any existing agency files, and may refer the case for an investigation. 7 C.F.R. 15f.9. After that process, the Director will either undertake settlement negotiations or instead inform the claimant that USDA's civil rights office "will not settle the complaint." *Ibid.* If the Director pursues settlement, and the matter is ultimately resolved to the satisfaction of all sides, the Director "will issue a final determination disposing of the matter." *Ibid.* If the matter is not settled, the Director must inform the claimant of his or her "options, including [the] right to request formal proceedings before an ALJ." *Ibid.*

There is no requirement that a claimant await a decision by the Director; the claimant can choose to bypass the Director's review "at any time" and go directly to an administrative law judge (ALJ). 7 C.F.R. 15f.10. If the claimant does not opt out of the Director's review, and

the Director issues a notice declining to settle the case, the claimant must request a formal ALJ hearing within 30 days of receiving the Director's notice. 7 C.F.R. 15f.9. If the claimant timely requests a formal ALJ hearing, the ALJ generally will hold a hearing at which parties can present testimony, argument, and evidence. 7 C.F.R. 15f.21(d).[1]

Ultimately, the ALJ will issue a "proposed determination," which will "become the final determination 35 days after it is made, unless" the claimant requests that the Assistant Secretary of Civil Rights review the ALJ's proposed determination (or the Assistant Secretary sua sponte decides to do so). 7 C.F.R. 15f.24(a). If there is such a request (or sua sponte decision) for further review, the Assistant Secretary will examine the case and issue the agency's "final determination." *Ibid.* "To the maximum extent practicable, a final determination will be made within 180 days" after the claimant files his or her Section 741 request. 7 C.F.R. 15f.24(b). A claimant has "at least 180 days after a final determination denying [an] eligible complaint under these rules to seek judicial review" in a court of competent jurisdiction. 7 C.F.R. 15f.26.

2. Petitioners are twelve African-American farmers who allege that USDA discriminated against them on the basis of race (and, in one case, gender) in administering various farm-loan and non-credit benefit pro-

---

[1] The Section 741 regulations note two circumstances in which a claimant is not entitled to an ALJ hearing before a final determination is rendered: (1) if the ALJ determines that the claimant never filed an "eligible complaint," or (2) if the dispute is limited to a question of law. 7 C.F.R. 15f.12.

grams. Pet. App. 2a.[2] Petitioners assert that they previously had filed "eligible complaints" within the meaning of Section 741. *Id.* at 3a. Between 1998 and 2000, they asked USDA to adjudicate their complaints under the administrative option set out in Section 741(b). *Ibid.*; see C.A. App. 344-45, 379-380, 414-415, 439-440, 473-474, 518-519, 561, 564.[3]

In accordance with the governing regulations, petitioners' complaints were referred to the Director for an informal settlement review. None of the petitioners ever exercised the right to bypass the Director and proceed directly to an ALJ hearing. Pet. App. 4a; C.A. App. 319-324.

Between March and May of 2003, the Director sent letters to petitioners notifying them that he had completed his informal review. In most cases, he stated that he had found the complaints inappropriate for settlement negotiation. C.A. App. 334, 374-375, 410, 435, 469, 523. In the remaining letters, the Director indicated that portions of the complaints might be appropriate for informal resolution, while others were not. *Id.* at 340, 511. All of the letters stated:

> [I]f you disagree with our decision you must request a hearing before an administrative law judge (ALJ) within thirty (30) days of receipt of this letter. Otherwise, USDA will close your file in this matter. A copy of the regulations governing this procedure is enclosed for your convenience. * * * If you receive

---

[2] Fourteen plaintiffs originally filed suit in this action, but two of them have not sought this Court's review. See Pet. ii n.1; Pet. App. 12a.

[3] Two of the petitioners did not file formal requests for adjudication, but their filings were nonetheless treated as such under the agency's regulations. See 7 C.F.R. 15f.5; C.A. App. 319-320, 328-334, 338-340.

> the ALJ's final decision and you are not satisfied, you may pursue your complaint by filing an action in Federal District Court.

Pet. App. 51a-52a; C.A. App. 334-335, 340-341, 375-376, 410-411, 436, 469-470, 511-512, 524.

Notwithstanding that notice, petitioners never requested ALJ review. Instead, they filed suit in district court in September 2003, alleging discrimination in USDA's loan programs along with various other claims for relief. Pet. App. 2a, 4a; C.A. App. 5.

3. a. USDA filed a motion to dismiss petitioners' claims, which the district court converted to a motion for summary judgment and then granted. Pet. App. 16a-49a. The court held that petitioners' ECOA claims failed for lack of exhaustion because petitioners never sought an ALJ decision on their discrimination complaints and thus never received a final agency decision. *Id.* at 37a-42a. The court grounded the exhaustion requirement not only in Section 741 and the regulations promulgated thereunder, but also in 7 U.S.C. 6912(e), which requires plaintiffs to "exhaust all administrative appeal procedures established by" USDA before suing the agency. Pet. App. 32a n.12. The court also applied the balancing test set out in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). After weighing petitioners' interest in immediate judicial review against the purposes served by the exhaustion doctrine, the court concluded that it would be inappropriate to excuse petitioners' failure to exhaust. Pet. App. 38a-39a & n.16.[4]

---

[4] The district court also considered petitioners' non-ECOA claims for monetary relief under the Constitution, the Administrative Procedure Act (APA), 42 U.S.C. 1981, and the common law. It held that all were barred by sovereign immunity. Pet. App. 45a-46a. The court of appeals

b. The court of appeals affirmed. Pet. App. 1a-13a. In considering petitioners' ECOA claims, the court first observed that petitioners had conceded at oral argument that Section 741(c) requires exhaustion. *Id.* at 8a n.* ("[T]he plaintiffs concede [that] § 741 requires exhaustion.") (citing oral argument recording); see *id.* at 9a ("The parties agree * * * that § 741(c) implicitly requires exhaustion."). Although petitioners had suggested that imposing the exhaustion requirement applied by the district court might be inconsistent with *Darby* v. *Cisneros*, 509 U.S. 137 (1993), the court concluded that *Darby* was inapplicable: petitioners' suit was brought under Section 741(c) rather than the APA, and Section 741(c) requires exhaustion. Pet. App. 8a n.*.[5]

The court of appeals then turned to whether petitioners had satisfied the exhaustion requirement in this case. The court observed that under Section 741(c), a plaintiff could seek judicial review only if his USDA claim was "denied administratively." Pet. App. 8a. Pursuant to USDA's regulations, the court explained, the Director had not "denied" petitioners' claims; rather, the Director had informed petitioners that he was declining to settle their complaints. *Ibid.* The court further explained that under the governing regulations, an administrative denial of the claim could occur only after an ALJ hearing, which petitioners had failed to request

---

affirmed, *id.* at 5a-7a, and petitioners do not seek this Court's review of the dismissal of those claims.

[5] The court of appeals also observed that 7 U.S.C. 6912(e) separately "requires exhaustion in suits against USDA generally," Pet. App. 9a-10a, but the court did not resolve whether that statute mandated exhaustion in this case.

at any point before or after receipt of the Director's letters. *Id.* at 8a-9a.

The government argued that because exhaustion was statutorily required in this case, the court lacked authority to excuse exhaustion for any reason. See Pet. App. 10a; *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). The court found it unnecessary to address that argument. Pet. App. 10a. Instead, the court concluded that even if it had discretion to excuse petitioners' failure to exhaust the administrative process, exhaustion should not be excused in this case under the balancing test set out in *McCarthy*, *supra*. Pet. App. 10a. On one side, the court explained that an exhaustion requirement was beneficial because it gave USDA the opportunity "to correct its own errors" and because requiring a formal ALJ hearing would produce "a useful record for subsequent judicial consideration." *Id.* at 10a-11a (quoting *McCarthy*, 503 U.S. at 145-146). On the other side, while petitioners asserted that they had a weighty interest in immediate review in light of the Director's delays, the court explained that the asserted interest was undermined by the fact that the plaintiffs had failed to exercise their option to bypass the Director and request ALJ review. *Id.* at 12a. The court also noted that there was no reason to doubt that ALJ hearings would have proceeded expeditiously had they been requested. *Ibid.* Accordingly, the court concluded that petitioners' interests in immediate review did not sufficiently outweigh the government's interests in requiring exhaustion. *Id.* at 12a-13a.

ARGUMENT

Petitioners contend that they exhausted their administrative remedies and that, in any event, any failure to exhaust should be excused in this case. The court of appeals correctly held, however, that petitioners failed to exhaust their remedies when they did not request an ALJ hearing and that their failure should not be excused. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners first argue (Pet. 11-14) that they sufficiently exhausted their administrative remedies. Specifically, petitioners assert that they all received letters from the Director "denying their claims," Pet. 13, and that their claims were thus "denied administratively" within the meaning of Section 741(c), Pet. 13-14. Petitioners argue that Congress did not require them to pursue any further administrative action to exhaust their claims under Section 741. *Ibid.*

As the court of appeals held (Pet. App. 8a-9a), however, the Director's letters do not constitute an administrative denial of their claims as required by Section 741(c).[6] When a claimant elects the administrative process under Section 741(b) "in lieu of filing a civil action" under Section 741(a), the claimant must complete the

---

[6] The government argued below that petitioners were separately required to exhaust administrative remedies under 7 U.S.C. 6912(e), which dictates that "[n]otwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by [USDA] or required by law before the person may bring an action in a court of competent jurisdiction" against USDA. See Pet. App. 32a n.12. Although the court of appeals did not reach that ground (*id.* at 9a-10a), Section 6912(e) provides an independent basis to affirm the decision below.

administrative process before seeking judicial review under Section 741(c). Contrary to petitioners' characterization, the Director's letters rejected only the possibility of "informal resolution" of the complaint, *i.e.*, settlement. *E.g.*, *id.* at 51a ("Based on our review, we have determined that your case is not appropriate for informal resolution."); C.A. App. 469 ("[Y]our case was heard by a neutral third party as part of [the Office of Civil Rights's] Alternative Dispute Resolution (ADR) Program. * * * The parties were unable to reach a mutually satisfactory resolution of this matter.").[7] A letter declining informal resolution is not a decision that constitutes administrative denial of a pending claim or marks the end of the administrative process.

USDA's regulations clarify that only an ALJ, or the Assistant Secretary for Civil Rights following an ALJ hearing, is authorized to issue a "final determination" denying a complaint. See 7 C.F.R. 15f.12, 15f.13. By contrast, if the Director decides not to pursue informal resolution of a complaint, the Director issues a letter informing the claimant only that the Office of Civil Rights "will not settle the complaint." 7 C.F.R. 15f.9. To receive a final agency determination once settlement

---

[7] The wording was somewhat different in the two letters in which the Director offered to engage in settlement negotiations over some of the claims, see C.A. App. 340-41 (letter to petitioner Cotton); *id.* at 511 (letter to petitioners Donnell, Randolph, and Bruce Manigo), and in one letter in which the Director stated that he had completed his review and concluded that the complaint was not an eligible complaint, see *id.* at 374-375 (letter to petitioner Deloney). But like the other letters, those letters made clear that if the recipient was dissatisfied with the Director's conclusion, the recipient "must request a hearing before an administrative law judge * * * within thirty (30) days of receipt of this letter." *Id.* at 340, 375, 511. In any event, petitioners do not suggest that a different outcome is warranted in those cases.

was declined, petitioners thus were required to "request formal proceedings before an ALJ * * * within 30 days of receipt of notice from the Director that [the Office of Civil Rights] will not settle the complaint." *Ibid.*[8]

As the court of appeals determined (Pet. App. 8a n.*), petitioners' reliance (Pet. 14) on *Darby* v. *Cisneros*, 509 U.S. 137 (1993), is inapt. In *Darby*, a claimant before the Department of Housing and Urban Development (HUD) attempted to obtain judicial review under the APA of a decision rendered by an ALJ without first seeking discretionary review of that decision by the Secretary of HUD. *Id.* at 140-142. Framing the question as whether "federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act * * * *where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review*," this Court answered no. *Id.* at 138, 146 (emphasis added).

As an initial matter, this case is governed by Section 741, not the APA, and petitioners conceded in the court of appeals that Section 741 at least implicitly requires exhaustion. Pet. App. 8a n.*, 9a; see *Darby*, 509 U.S. at 153-154 ("[T]he exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA."). Moreover, as discussed above (pp. 10-11, *supra*), Section 741(c) and 7 C.F.R. 15f contemplate final

---

[8] Although the regulations are clear on this point, petitioners could not succeed even if the regulations were deemed ambiguous. USDA would be entitled to controlling deference. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (explaining that an agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation") (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

agency denial of a claim, not merely a Director's denial of informal resolution, before it becomes ripe for judicial review. Unlike *Darby*, therefore, this is not an APA case "where neither the statute nor agency rules specifically mandate exhaustion." 509 U.S. at 138. To the contrary, the statute and agency rules both require claimants to obtain an administrative denial of their claims by an ALJ before seeking judicial review.

Even if Section 741 were ambiguous—which it is not—USDA is entitled to deference in its interpretation of the provision. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). Petitioners point to nothing in Section 741 that unambiguously equates the Director's settlement evaluation with a definitive agency denial of a claim subject to judicial review. That is especially true where, as here, the relevant regulations reinforce the "strong presumption * * * that judicial review will be available only when agency action becomes final." *Bell* v. *New Jersey*, 461 U.S. 773, 778 (1983). Moreover, petitioners do not cite any decision of another court of appeals that even arguably conflicts with the decisions below.

2. Petitioners alternatively challenge (Pet. 15-17) the court of appeals' rejection of their contention that their failure to exhaust should have been excused. But petitioners do not allege that there is any conflict among the courts of appeals on that issue, and although they do allege a factbound misapplication of this Court's decision in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), even that contention is incorrect.

In *McCarthy*, the Court stated that the "general rule" is that parties must "exhaust prescribed administrative remedies before seeking relief from the federal courts." 503 U.S. at 144-145. The Court recognized,

however, that in certain cases a court may excuse that requirement after it "balance[s] the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *Id.* at 146.

Here, several institutional interests favor adherence to the exhaustion requirement. As the court of appeals recognized (Pet. App. 10a-11a), requiring exhaustion would afford USDA the opportunity to correct its own errors, thereby potentially preventing the need for judicial involvement. See *McKart* v. *United States*, 395 U.S. 185, 195 (1969) ("[N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors."). Moreover, requiring a formal ALJ hearing would produce "a useful record for subsequent judicial consideration" of petitioners' fact-based discrimination claims. *McCarthy*, 503 U.S. at 145-146; see 7 C.F.R. 15f.21(d)(1). Indeed, the age of the underlying claims raises particular concerns about unavailable evidence—a problem exacerbated by the lack of a formal agency record for judicial review.

Notwithstanding those unrebutted interests, petitioners contend (Pet. 15-17) that they were entitled to immediate judicial review because the Director took what they regard as an excessive amount of time to complete his informal settlement evaluation. But, as the court of appeals noted (Pet. App. 12a), petitioners were free to bypass the Director *at any time* by proceeding directly to an ALJ hearing. See 7 C.F.R. 15f.10. Moreover, at the time Section 741 was enacted, petitioners were given the option to bypass the agency entirely by bringing an action directly in federal court under Section 741(a). This is thus not a case in which petitioners were trapped in administrative proceedings with no way

to advance. Instead, petitioners chose to submit their claims to the agency instead of the courts, and then chose to await the conclusion of the Director's review instead of proceeding to an ALJ hearing.

Finally, petitioners contend (Pet. 17) that they were entitled to immediate judicial review because USDA's civil rights office had problems processing complaints in the 1980s and early 1990s. But that concern was addressed when Congress passed Section 741 in 1998. Section 741 gave petitioners the option of going directly to federal court, or instead submitting their claims to USDA under a new complaint process with statutorily mandated safeguards. See p. 3, *supra*. Petitioners chose the latter procedure, and they proffer no specific reason to question the competence, fairness, and efficiency of ALJ decisionmaking under that procedure had they pursued it to completion. See Pet. App. 12a. Indeed, two of petitioners' co-claimants requested and were provided ALJ hearings during this litigation, *ibid.*; one of them received a favorable ALJ decision awarding him damages, see *McDonald* v. *Vilsack*, SOL Docket No. 09-0177, 2010 WL 3025816 (U.S.D.A. July 8, 2010), and the other settled his administrative complaint, see *In re Richard Pearson*, SOL Docket No. 09-0178 (U.S.D.A. Oct. 13, 2010).

In sum, as the court of appeals concluded (Pet. App. 12a-13a), even if the court has authority to excuse a failure to exhaust the administrative process under Section 741, petitioners' interests in immediate review did not sufficiently outweigh the government's interests in re-

quiring exhaustion. In any event, that factbound issue does not warrant this Court's review.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
BENJAMIN M. SHULTZ
Attorneys

DECEMBER 2010

---

[9] The government further argued below that courts lack authority to excuse a failure to exhaust under Section 741 and under 7 U.S.C. 6912(e), discussed at note 6, *supra*. The court of appeals did not reach that argument. Pet. App. 9a-10a. That alternative argument, however, would furnish an alternative ground for affirmance and provides yet another reason against further review.